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No. 1638

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. W. JENNINGS, As Administrator of the Estate of JOE ERNESTO LEONESIO, Alias JOE LEON, Deceased,

Plaintiff in Error,

vs.

THE ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U.S. Circuit
Court of Appeals
504

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Statement of Errors, etc., on Which Plaintiff in Error Intends to Rely.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, Alias JOE LEON, Plaintiff,

Plaintiff in Error.

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation), Defendant,

Defendant in Error.

To the Clerk of the Above-entitled Court:

The following is a statement of the errors on which plaintiff in error intends to rely:

(I) The Court erred in holding at the conclusion of all the evidence that "There is an absolute failure of proof of any damages."

(II) The Court erred in holding at the conclusion of the evidence that there was no proof in this case of carelessness or negligence on the part of defendant which would permit the recovery of damages.

(III) The Court erred in sustaining defendant's motion, made at the conclusion of all the evidence, to direct the jury to return a verdict in favor of the defendant.

(IV) The Court erred in directing the jury to return a verdict in favor of defendant.

(V) The Court erred in denying plaintiff's motion for a new trial.

(VI) The Court erred in rendering judgment in favor of defendant.

And for the consideration of the said errors I deem those parts of the record hereinafter mentioned to be unnecessary, to wit:

(a) From and including the word "Cross-examination" on page 243 to and including page 255.

(b) Pages 275 to 283, both inclusive. (All)

(c) Pages 323 to 326, both included. (All)

(d) From and including the words "Did you, etc.," on page 334 to and including page 341. Also Index found on pages 386, 387, 388, 389, inclusive.

(e) Page 345 down to and including "That is all," on page 365.

And I do direct you not to print said portions of the record unless defendant in error desires that they be printed.

Z. R. CHENEY,
Attorney for Plaintiff in Error.

Copy received. Service accepted August 12, 1908.
SHACKLEFORD & LYONS,
Attys. for Defdt. in Error.

[Endorsed]: Original. No. 1638. In the Circuit Court of Appeals for the Ninth Circuit. R. W. Jennings, as Admr., etc., Plaintiff, vs. Alaska Treadwell Gold Mining Co., Defendant. Direction to Clerk as to Printing Record. Filed Aug. 24, 1908. F. D. Monckton, Clerk. Z. R. Cheney, Attorney for Plff. Office: Juneau, Alaska. L. S. B. Sawyer, of Counsel.

In the United States Circuit Court of Appeals for the Ninth Circuit.

1638.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, Alias JOE LEON,

Plaintiff in Error,

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant in Error.

Designation Under Rule 23 of Defendant in Error.

To the Clerk of the United States Circuit Court of Appeals:

The defendant in error hereby designates the following additional parts of the record in this action which it thinks material and should be printed:

1st. All of pages 276 to 283 of said record, both inclusive.

2d. All of pages 334 to 341 of said record, both inclusive.

3d. All of pages 347 to 360 of said record, both inclusive.

Dated September 3d, 1908.

SHACKLEFORD & LYONS and
JOHN FLOURNOY,
Attorneys for Defendant in Error.

[Endorsed]: No. 1638. In the United States Circuit Court of Appeals for the Ninth Circuit. R. W.

Jennings, as Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon, Plaintiff in Error, vs. Alaska Treadwell Gold Mining Company, a Corporation, Defendant in Error. Defendant in Error's Designation Under Rule 23. Filed Sep. 4, 1908. F. D. Monckton, Clerk. John Flournoy, Attorney at Law.

In the United States Circuit Court of Appeals for the Ninth Circuit.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, alias JOE LEON,

Plaintiff in Error,

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant in Error.

Supplemental and Amended Designations of Defendant in Error Under Rule 23.

To the Clerk of the United States Circuit Court of Appeals:

The defendant in error hereby files its supplemental and amended designations under Rule 23 and designates the following additional parts of the record in this action which it thinks material and should be printed:

1st. All of pages 276 to 283 of said record, both inclusive.

2d. All of pages 334 to 341 of said record, both inclusive.

Dated September 8th, 1908.

SHACKLEFORD & LYONS and
JOHN FLOURNOY,
Attorneys for Defendant in Error.

[Endorsed]: No. 1638. United States Circuit Court of Appeals for the Ninth Circuit. R. W. Jennings, as Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon, Plaintiff in Error, vs. Alaska Treadwell Gold Mining Company, a Corporation, Defendant in Error. Supplemental and Amended Designations of Defendant in Error Under Rule 23. Filed Sep. 10, 1908. F. D. Monckton, Clerk. John Flournoy, Attorney at Law.

Addresses of Attorneys of Record.

For R. W. Jennings, as Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon, Deceased, Plaintiff in Error:

R. W. JENNINGS, in Person, Juneau, Alaska.

Z. R. CHENEY, Juneau, Alaska.

For Alaska Treadwell Gold Mining Company, a Corporation, Defendant in Error:

SHACKLEFORD & LYONS, Juneau, Alaska.

[Praecipe for Transcript of Record.]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 460-A.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, alias JOE LEON, Deceased,

Plaintiff,

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant.

The clerk will please embody in the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit copies of the following mentioned papers, to wit: Amended Complaint, Answer, Reply, Bill of Exceptions, Judgment, Journal Entry on page 411, being telegram of Aug. 21/07, Petition for Writ of Error, Assignment of Errors, Bond, Original Writ of Error and Original Citation, substitution of attorneys, order extending time to file transcript, and order extending time to file transcript of Aug. 6, 1908.

Please entitle all papers except the first, "Same court—same cause," and arrange in the order indicated above.

Z. R. CHENEY,
Attorney for Plaintiff, Appellant.

[Endorsed]: No. 460-A. In the District Court for the District of Alaska, Div. No. 1. R. W. Jennings, as Administrator, etc. vs. Alaska Treadwell Gold Mining Company, a Corporation, Deft. Praecipe to Clerk. Filed Sep. 19, 1907. C. C. Page, Clerk. By ————————, Deputy. Z. R. Cheney, Attorney for Plff.

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, alias JOE LEON, Deceased,

Plaintiff,

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant.

Amended Complaint.

Plaintiff, for his cause of action, alleges:

I.

That the plaintiff is a resident of Juneau, Alaska; that the defendant is, and was at all times hereinafter mentioned, a corporation, duly organized, created and existing and doing business in Alaska, and as such owned and operated a certain mine on Douglas Island, Alaska, known as the Treadwell.

II.

That Joe Ernesto Leonesio, alias Joe Leon, was killed at Treadwell, Alaska, on or about the 5th day

of August, 1903, while in the discharge of his duties as an employee of the defendant corporation.

III.

That heretofore, to wit, on June 24th, 1905, the plaintiff, having filed his petition in the Probate Court at Juneau, Alaska, praying to be appointed administrator of the estate of said Joe Ernesto Leonesio, alias Joe Leon, deceased, was duly appointed as such administrator, and plaintiff is now the duly appointed, qualified and acting administrator of the estate of said deceased and brings this action as such.

IV.

That on the night of August 5th, 1903, and at the time of his death as aforesaid, the said Joe Ernesto Leonesio, alias Joe Leon, had come, and was, upon the premises of defendant, rightfully, by its consent and invitation and was then and there in the furtherance of its business.

That on said occasion and at said time said Joe Ernesto Leonesio, alias Joe Leon, was, and for a long time prior thereto, had been, an employee and servant of defendant corporation; that he was then and there, under the direction and supervision of defendant, its officers, agents and vice-principals, and in the place of work provided by them, engaged in the work of operating and assisting in the operation of what is known and called a machine drill; said machine drill, and the place directed and provided by defendant, as aforesaid, for said Joe Ernesto Leonesio, alias Joe Leon, to work in, and in which he was, and was engaged in the work aforesaid, at

the time of his death as herein stated, was situated at the bottom of a perpendicular shaft of and in said Treadwell mine, directly under the opening of said shaft on the surface of the ground, and about eight hundred and fifty feet underneath said surface; that said shaft had been constructed and was being used by defendant as a way through which its ore was, then and there, being extracted from the said mine and raised up and above the surface of the ground to be there dumped, into chutes and thence to pass to and be crushed by its stamps;

That said raising of said ore up said shaft was then and there being effected by means of a skip or elevator attached to one end of a cable, the other end of said cable being attached to certain machinery and appliances situated above the surface of the ground, and the raising or lowering of said skip (empty or loaded as the exigency might require) being effected by the action of said machinery and appliances on said cable, winding or unwinding the same around a sheave-wheel situated about sixty feet above the surface of the ground and directly over the mouth of said shaft; the whole being owned, operated and controlled by defendant corporation, exclusively, and situated on its premises aforesaid.

V.

That it became and was the duty of the defendant corporation to use care that the place provided by it, in which said Joe Ernesto Leonesio, alias Joe Leon, was working, as aforesaid, was, and was kept in, a reasonably safe condition and that the premises

owned and controlled by it, as aforesaid, were kept in a condition reasonably safe for persons coming on said premises rightfully and for purposes of legitimate business; that the place so provided and directed by defendant, as aforesaid, was not an ordinarily safe place to work, and said defendant corporation did not use reasonable care to make or keep it so; and said premises were not kept in a condition reasonably safe for persons coming thereon rightfully and for purposes of legitimate business, and defendant did not use reasonable care to see that said premises were safe for said persons and employees, but was negligent in these respects.

That defendant's negligence consisted of the fact that, on the occasion herein stated, said cable was old, weak and insufficient for the purposes for which it was used and the sheave-wheel, used by defendant, as aforesaid, in operating said cable and in raising said skip up said shaft, as aforesaid, was old, weak, much used, cracked, broken and totally unfit for said purposes, and on that account liable to give way and cause said cable to break and said skip to fall upon and injure or kill the persons situated as was said Joe Ernesto Leonesio, alias Joe Leon, as aforesaid; none of which facts were known to said deceased, but all of which facts were, or ought to have been, known to defendant, and that, notwithstanding said knowledge on the part of said defendant, it continued to use said cable and sheave-wheel for the purposes aforesaid; that defendant knew that said Joe Ernesto Leonesio, alias Joe Leon, was, and was working, at

the time and place aforesaid and as hereinafter stated and knew, or ought to have known, of the danger aforesaid, but, notwithstanding said knowledge on its part, it knowingly failed and neglected to construct, in said shaft, bulkheads or breaks of sufficient size or strength to prevent objects from falling down said shaft upon and injuring persons at the bottom of said shaft and so negligently operated and managed said skip that said deceased was killed as herein stated.

VI.

That on the night of August 5th, 1903, and while said Joe Ernesto Leonesio, alias Joe Leon, was at, and was so employed and working in said place, a loaded ore skip, which was then and there attached to said cable in said shaft, and which was then and there being used and operated by defendant in hoisting its ore up said shaft, suddenly and without warning and by reasons of the facts herein stated, fell to the bottom of said shaft, on, upon and against said Joe Ernesto Leonesio, alias Joe Leon, and his co-laborers, thereby killing him, the said Joe Ernesto Leonesio, alias Joe Leon.

VII.

That, at the time of his death, the said deceased was engaged in the work of sinking said shaft and had nothing whatsoever to do with the hoisting of said ore or with the selection, supervision, management, control or operation of said cable, skip, wheel, machinery or appliances.

VIII.

That the falling of said ore skip was caused by

the breaking of said cable to which it was attached and the breaking of said cable was due to the fact that the same was old and weak, and the sheave-wheel, used by defendant, was old, weak, much used, cracked and broken, as aforesaid, and being so, and because of the negligent manner in which it was being used and operated by defendant, it suddenly gave way and caused a sudden and violent strain to be put upon the cable thereby breaking the same.

IX.

That the death of said Joe Ernesto Leonesio, alias Joe Leon, was caused by the wrongful, unlawful and negligent acts of defendant, as aforesaid, and without fault or negligence on his part.

X.

That at the time of his death, as aforesaid, said Joe Ernesto Leonesio, alias Joe Leon, was in the prime of life, and was about twenty-three years of age, and was a healthy, robust, economical, temperate and frugal man, and was earning and capable of earning four dollars and fifty cents per day; that he was supporting his father and mother from his earnings and they were dependent upon him for such support; that by reason of the wrongful, unlawful and negligent acts of defendant, as aforesaid, in causing the death of said Joe Ernesto Leonesio, alias Joe Leon, his father and mother aforesaid have been deprived of their means of support to their great and irreparable injury and damage.

XI.

That by reason of the premises the defendant, in

negligently causing the death of said Joe Ernesto Leonesio, alias Joe Leon, as aforesaid, has damaged said heirs and estate of said deceased and this plaintiff in the sum of ten thousand dollars.

Wherefore, plaintiff demands judgment against defendant for the sum of ten thousand ($10,000.00) dollars, together with the costs and disbursements of this action.

Z. R. CHENEY,
Attorney for Plaintiff,
Juneau, Alaska.

United States of America,
District of Alaska,—ss.

United States of America,
District of Alaska,
Division No. One,—ss.

I, Z. R. Cheney, being first duly sworn, on oath, say: That I am the attorney for plaintiff in the above-entitled action; that I have read the foregoing amended complaint and know the contents thereof, and believe the same to be true; that I make this affidavit because the plaintiff is absent from this district and all the material allegations of the pleading are within my personal knowledge.

Z. R. CHENEY.

Subscribed and sworn to before me this twenty-first day of August, 1905.

T. R. LYONS,
Notary Public.

[Notarial Seal of T. R. Lyons]

[Endorsement]: No. 460-A. In the United States District Court for the District of Alaska, Division No. One, Juneau. R. W. Jennings, as Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon, Deceased, Plaintiff, vs. Alaska-Treadwell Gold Mining Company, a Corporation, Defendant. Amended Complaint. Filed Aug. 21, 1905. C. C. Page, Clerk. By A. L. Collison, Asst. Z. R. Cheney, Attorney for Plaintiff, Juneau, Alaska. Original.

Due service of the within Amended Complaint is admitted this 21st day of August, 1905.

MALONY & COBB,
Attorneys for Defendant.

[Same Court, Same Cause.]

Answer.

Now comes the defendant by its attorneys and for answer to the amended complaint herein alleges:

I.

Defendant denies that Joe Ernesto Leonesio, alias Joe Leon, was killed at Treadwell, Alaska, while in the discharge of his duties as an employee of the defendant herein.

II.

Defendant denies all and singular the allegations contained in the third paragraph of said complaint.

III.

Referring to paragraph IV of said complaint, defendant denies all and singular the allegations therein contained.

IV.

Defendant denies all and singular the allegations of fact contained in the fifth paragraph of said complaint.

V.

Referring to paragraph VI of said complaint, defendant admits one Joe Leon was killed at the bottom of a shaft in the Treadwell mine on or about said date, but it denies all and singular the other and remaining allegations of said paragraph.

VI.

Referring to paragraph VIII of said complaint, defendant denies all and singular the allegations therein contained.

VII.

Referring to paragraph IX of said complaint, defendant denies all and singular the allegations therein contained.

VIII.

Referring to paragraph X of said complaint, defendant denies that at the time of his death said Joe Leon was earning or capable of earning $4.50 per day or any greater sum than $3.50 per day; it denies all and singular the other and remaining allegations in said paragraph contained.

IX.

Referring to paragraph XI of said complaint, defendant denies all and singular the allegations therein contained.

And for another and affirmative defense to said cause of action, defendant alleges that the plaintiff

has no capacity to have and maintain this suit against it for the cause of action alleged in said complaint, for that: it is not true that the plaintiff, R. W. Jennings, is the duly appointed, qualified and acting administrator of the estate of Joe Ernesto Leonesio, alias Joe Leon, at the time of bringing this action or at any other time, but that in truth and in fact, long prior to the pretended appointment of the plaintiff, R. W. Jennings, as administrator, one P. H. Fox had been duly appointed and qualified as such administrator, and was such appointed, qualified and acting administrator at the time of the pretended appointment of plaintiff herein, and that said pretended appointment of plaintiff is null and void.

Wherefore, defendant prays that this suit be abated, and that they have and recover from the plaintiff in his individual capacity its costs herein incurred.

_____,

Attorneys for Defendant.

United States of America,
District of Alaska,—ss.

Robt. A. Kinzie, being first duly sworn, deposes and says: I am the general superintendent of the defendant corporation in the above-mentioned action; I have heard read the foregoing answer and know the contents thereof, and the matters and things therein set out are true as I verily believe.

ROBT. A. KINZIE.

Subscribed and sworn to before me this 26th day of July, 1905.

[Notarial Seal of James Christoe.]

JAMES CHRISTOE,
Notary Public in and for Alaska.

[Indorsement]: Original. No. 460-A. In the United States District Court for Alaska, Division No. 1, at Juneau. R. W. Jennings, as Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon, Plaintiff, vs. Alaska Treadwell Gold Mining Co., a Corporation, Defendant. Answer. Filed Aug. 24, 1905. C. C. Page, Clerk. By A. L. Collison, Asst. Malony & Cobb, Attorneys for Defendant. Office, Juneau, Alaska.

[Same Court, Same Cause.]

No. 460-A.

Reply.

Comes now the plaintiff and for his reply to defendant's answer, alleges:

Replying to paragraph No. IX of said answer beginning with the words "And for another and affirmative defense" and ending with the words "and that said pretended appointment of plaintiff is null and void," this plaintiff admits that prior to his own appointment as administrator, as alleged in his complaint, one P. J. Fox had been appointed and qualified as administrator of said estate, but plaintiff denies that the appointment of said Fox was duly or legally made, and denies that plaintiff's appointment is null and void.

Plaintiff further alleges that heretofore and before plaintiff's appointment as administrator of said estate, the said P. H. Fox was, by an order of the Probate Court at Juneau, Alaska, made upon the petition of the heirs at law of the deceased and upon a citation duly served upon said P. H. Fox, duly removed as such administrator and his Letters of Administration were thereby revoked, and thereupon this plaintiff was appointed as such administrator and Letters of Administration issued to him by said Court, as alleged in plaintiff's complaint, and plaintiff's said letters have never been revoked.

Wherefore, plaintiff demands judgment as in his complaint.

Z. R. CHENEY,
Attorney for Plaintiff, Juneau, Alaska.

United States of America,
District of Alaska,
Division No. One,—ss.

I, Z. R. Cheney, being first duly sworn, on oath, say: That I am the attorney for the plaintiff in the above-entitled action; that I have read the foregoing Reply and know the contents thereof, and believe the same to be true; that I make this affidavit because the plaintiff is not within the District of Alaska, Div. No. 1.

Z. R. CHENEY.

Subscribed and sworn to before me this twelfth day of Sept., 1905.

[Notarial Seal]

T. R. LYONS,
Notary Public.

Due service of the within Reply is admitted this 12th day of September, 1905.

MALONY & COBB,
Attorneys for Deft.

[Indorsement]: No. 460-A. In the United States District Court for the District of Alaska, Division No. One, Juneau. R. W. Jennings, as Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon, Deceased, Plaintiff, vs. Alaska Treadwell Gold Mining Company, a Corporation, Defendant. Reply. Filed Oct. 18, 1905. C. C. Page, Clerk. By D. C. Abrams, Deputy. Z. R. Cheney, Attorney for Plaintiff. Juneau, Alaska. Original.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 460-A.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, alias JOE LEON, Deceased,

Plaintiff,

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant.

Bill of Exceptions.

Be it remembered that this cause came on for trial on the 13th day of May, 1907, on the amended complaint, answer, and reply, before Hon. James Wick-

ersham and a jury of twelve good and lawful citizens, duly empaneled, chosen and sworn; opening statements having been made on behalf of the parties hereto by their respective counsel herein, the following proceedings were had and the following evidence introduced and offered by and on behalf of said parties respectively:

TESTIMONY FOR THE PLAINTIFF.

Plaintiff introduced certified copies of his Letters of Administration, Bond, Oath of Office and other instruments and court records, which showed only that at the time of bringing the action and at the time of the trial hereof he was the duly appointed, qualified and acting administrator of the estate of Joe Ernesto Leonesio, alias Joe Leon. Said instruments and court records constituted Plaintiff's Exhibit 1 to 9, inclusive.

[Testimony of Nels Peterson.]

NELS PETERSON, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JENNINGS.)

Q. What is your name?

A. Nels J. Peterson.

Q. Where do you reside?

A. Douglas Island.

Q. By whom are you employed?

A. The Treadwell Gold Mining Company.

Q. The defendant in this case, the Alaska-Treadwell Gold Mining Company? A. Yes, sir.

(Testimony of Nels Peterson.)

Q. In what capacity? A. I am a miner.

Q. How long have you been employed by the Alaska Treadwell Gold Mining Company?

A. A little over six years.

Q. Were you in their employ on the 5th day of August, 1903? A. Yes, sir.

Q. Where? A. I was working in the shaft.

Q. In what part of the shaft?

A. In the bottom.

Q. The shaft to what mine?

A. The Treadwell mine.

Q. What were you doing there?

A. Sinking the shaft.

Q. Sinking the shaft? A. Yes, sir.

Q. How did you do that?

A. Run three machines down there.

Q. Machine drills? A. Yes, sir.

Q. How many men of you were down there?

A. Six men down there.

Q. Who were they?

A. Knute Hanson, Ole Linge, myself, Joe Leon, ——— Jackson, and John Arthurn.

Q. Ole Linge was working on the same machine with you? A. Yes, sir.

Q. Who had charge of the machine?

A. I did.

Q. Joe Leon was your helper? A. Yes, sir.

Q. What wages were you getting?

Mr. COBB.—We object to that as incompetent.

Mr. JENNINGS.—It is merely preliminary.

(Testimony of Nels Peterson.)

COURT.—Go ahead.

Q. How much was your helper getting?

A. I don't know what he was getting.

Q. Was he getting as much as you were?

A. No.

Q. How much less was *you* getting?

A. Generally twenty-five cents a day.

Q. Who got less, the helper or the man tending the machine? A. The helper get less.

Q. He got twenty-five cents less a day?

A. Yes, sir.

Q. How much did you get?

A. Four dollars a day.

Q. Then the helper would get three seventy-five a day? A. I believe so.

Q. How about your board, was that extra?

A. That was extra.

Q. Did you have to pay for your board out of this $3.75? A. No, the board with $3.75.

Q. Three seventy-five and board?

A. Yes, sir.

Q. You say you were there on the night of August 5, 1903? A. Yes, sir.

Q. And these other men were there?

A. Yes, sir.

Q. Did anything unusual or out of the ordinary happen that night? A. Yes, sir.

Q. What happened?

A. The skip came down to the bottom and killed two men.

(Testimony of Nels Peterson.)

Q. What two men?

A. Ole Linge and Joe Leon.

Q. Did it hurt you?

Mr. COBB.—We object to that.

Mr. JENNINGS.—I will withdraw the question.

Q. What condition did it leave you in so far as being unconscious or not?

Mr. COBB.—We object to that as incompetent, irrelevant and immaterial.

COURT.—Overruled. Exception allowed.

A. I had a broken leg.

Q. Were you rendered unconscious?

A. Yes, sir.

Q. Do you know how long you were unconscious?

A. I do not.

Q. About what time of the night was it the last you remember?

A. I could not say—it was between one and two o'clock somewhere.

Q. Between one and two o'clock in the morning of that day? A. Yes, sir.

Q. What was the first thing you saw when you became conscious?

A. I did not see anything, it was all dark.

Q. Then what happened?

A. The shift boss came down as soon as they could.

Q. Now, just before this skip came down and you were injured, what was the condition of the light in the shaft?

(Testimony of Nels Peterson.)

A. Plenty of light before the accident.

Q. When you woke up from your unconscious condition did you say it was dark?

A. Yes, sir.

Q. Did you know—do you remember how long it was after you recovered before the lights were turned on again?

A. I could not say; probably fifteen minutes.

Q. Who brought the light?

A. The shift boss.

Q. Who was he?

A. His last name was Burns.

Q. What did you see then?

A. I saw the two men that were dead.

Q. Where was Joe Leon—how far from you was he when you saw him?

A. About two feet away from me.

Q. What position was he in with reference to the machine he had been working on—the machine drill he had been working on—was he on top of the machine or was the machine on top of him?

A. No, he was on top of the machine.

Q. Did you see what had broken it?

A. The skip lay down at the bottom.

Q. Did you see any timber there? A. Yes.

Mr. COBB.—We object to his leading the witness.

Mr. JENNINGS.—I admit it is leading.

A. I noticed timber there.

Q. How large a place was the shaft this part—that is the part that had been excavated—this little enclosure where these men were working?

(Testimony of Nels Peterson.)

A. It was a space about nine by twenty-three.

Q. How big a man—what kind of a man was Joe Leon? A. I know he was bigger than I was.

Q. Younger man than you were then?

A. Yes, may be a little younger—I could not say.

Q. How old were you then?

A. I was twenty-seven years old.

Q. What kind of a looking man was he—did he look like a healthy or sickly looking fellow?

Mr. COBB.—Objected to as leading.

COURT.—Go ahead.

A. He was a healthy looking man.

Q. Did he have any mustache?

A. I don't remember—I don't know.

Q. Well, was he a good workman?

Q. How large a man was he?

A. He was a little bit taller than I was.

Q. A little bit taller than you?

A. Yes, sir.

Q. State what was his habit and method in dealing with the machine; did he act like a novice or one used to the business.

A. Acted like a man who knew his business all right.

Q. What is your best estimate as to his age?

A. I should think somewhere about twenty-four years old.

Q. About twenty-four years old?

A. By looking at him—more than that I can't tell.

Q. That shaft was a four compartment shaft?

(Testimony of Nels Peterson.)

A. Yes, sir.

Q. In which compartment was Joe Leon working?

A. He was working in the center of the shaft.

A. Yes, sir.

Q. In the center of the shaft? A. Yes, sir.

Mr. JENNINGS.—Take the witness.

Cross-examination.

(By Mr. COBB.)

Q. You were working for Able Bartelo?

A. Yes, sir.

Q. He was sinking the shaft?

A. Yes, sir.

Q. Joe Leon was working for him too?

A. Yes, sir.

Q. You don't mean to tell the jury that $3.75 including board is the going wages in that mine?

A. We got—I got $4.00 and board. I don't know what he got.

Q. What I mean is this, that is only for work of a special kind like work in sinking that shaft that you got that much?

A. When we were sinking that shaft.

Q. You did not get it any other time?

A. No.

Q. Neither did Joe Leon? A. No.

Q. Do you know what the going wages are there for men like Joe Leon?

A. Sometimes two twenty-five, sometimes two fifty. If he is a machine man he gets two fifty, and if he is a helper he gets two twenty-five.

(Testimony of Nels Peterson.)

Q. At this particular time and this kind of work, the work you were doing at the bottom of the shaft you were being paid extra? A. Yes, sir.

Q. And you were being paid extra at that time for the reason that it was necessarily dangerous work at the bottom of the shaft and it was so considered?

Mr. JENNINGS.—Objected to as not proper cross-examination.

COURT.—Overruled.

A. Well, we had to buy our own rubber boots and slickers and dress warmer than the other laborers.

Q. The question I asked you was if you are not always paid extra for sinking shafts because it is considered extra dangerous work?

A. Yes, sir.

Q. That is the reason they are paid extra money?

A. Yes, sir.

Redirect Examination.

(By Mr. JENNINGS.)

Q. You say you had to buy rubber boots and slickers that you would not have to buy in other parts of the mine?

A. Yes. In some parts of the mine you don't have to wear them.

Q. It is just as dangerous to do any kind of mining as it is to sink a shaft? A. No, it ain't.

Q. You don't consider that you were being paid extra because that was extra dangerous, you got extra money to buy rubber boots and slickers?

(Testimony of Nels Peterson.)

Mr. COBB.—We object to his leading the witness.

COURT.—I am inclined to sustain the objection. Direct his attention to the matter and let the witness testify.

A. Well, I am not acquainted with the English language very well. I don't know every word the man was talking about.

JUROR.—I did not hear what he said.

COURT.—He says he does not understand everything the attorneys ask him.

Q. Well, we will go slower. You said you were getting $3.75, the helper was, and Mr. Cobb asked you if that was a little more than the other miners got? A. Yes, sir.

Q. Was that increase added because you had to buy slickers?

A. It was for a little—a little bit harder work?

Q. It was because it was harder work?

A. Yes, sir.

Q. You said you were working for Mr. Bartelo?

A. Yes.

Q. You got the money—you went to the treasurer or paymaster of the company to get your money?

A. Yes, get money from the store.

COURT.—Can you hear the witness?

JUROR.—We can most of the time; once in a while we can't understand what he says.

Mr. JENNINGS.—Talk so I can hear you back here.

(Testimony of Nels Peterson.)

Q. I asked you if you got the money from the store? A. Yes, sir.

Q. The company paid you the money?

A. Yes, sir.

Q. And these other men that were with you—they all got paid at the store?

A. That all paid at the store.

Q. I asked you if this little extra money was paid for working in the shaft—if that was on account of the rubber boots and slickers that you had to buy which you did not have to buy in other parts of the mine or because it was extra dangerous work?

Mr. COBB.—Objected to as leading.

COURT.—Overruled.

A. It was for rubber boots and slickers and we had a little more to do.

Q. It was harder work you think?

A. Yes, sir.

That is all.

Recross-examination.

(By Mr. COBB.)

Q. There are other parts of the mine where they have to use rubber boots and slickers?

A. Yes, sir.

Q. You don't get extra pay for working there?

A. No.

Q. As a matter of fact, is it not true you got extra pay for working at the bottom of that shaft because it was dangerous work?

A. I don't see any more danger there than working in other parts of the mine.

(Testimony of Nels Peterson.)

Q. Don't you get paid for it because other people consider it dangerous—is not that the reason why you get extra pay.

Mr. JENNINGS.—We object—

COURT.—Overruled.

A. I was working in the Glory Hole—it is a mine—and I had more pay there than I had inside the mine.

Q. And that is considered a dangerous place too, is it not?

A. I don't see any more danger there than working in the mine.

Q. Now, answer this question, Mr. Peterson. Is it not a fact that the men are paid higher wages when engaged in sinking a shaft for the reason that the work there is considered extra dangerous?

A. I don't know what somebody else think. I don't think it paid any higher wages. I didn't go there because there was more danger I wanted to get higher wages.

Q. You wanted to get higher wages?

A. Yes, sir.

Q. And they were paying higher wages there?

A. Yes, sir.

Q. And don't you know they were paying higher wages because it was more dangerous work?

A. I did not see any more danger.

Q. I am not asking you if you saw it; I am asking you if they did not pay higher wages because it was considered more dangerous?

(Testimony of Nels Peterson.)

COURT.—Answer the question if you know.

A. I don't know how to answer that question that way.

That is all.

Redirect Examination.

(By Mr. JENNINGS.)

Q. In sinking the shaft you were in charge of a machine drill? A. Yes, sir.

Q. A pick and shovel man has no machinery to look after. A. It was a drilling machine.

Q. Run by steam? A. No, run by air.

Q. Compressed air? A. Yes, sir.

Q. You were in charge of that machine?

A. Yes, sir.

Q. State if that requires skill and experience?

Mr. COBB.—Objected to as incompetent.

COURT.—Overruled.

A. Well, it is pretty hard work.

That is all.

[Testimony of Joe Pazetti.]

JOE PAZETTI, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JENNINGS.)

Q. You are called as a witness, so just answer the questions that I ask you. Where do you work?

A. Now?

Q. Yes. A. At the three hundred mill.

(Testimony of Joe Pazetti.)

Q. For the Treadwell Company?

A. Up by the Glory Hole.

Q. How long have you lived around Douglas?

A. Some time—I have been in Douglas some time. I no work for the company some time three years ago.

Q. How long have you lived in this country?

A. Maybe seven years.

Q. Were you acquainted with Joe Leon? Did you know him?

A. I know he came in Alaska—I never see him before.

Q. You knew him when he was working at the Treadwell mine?

A. For maybe a month—month and half he come in the mine.

Q. You say you did know Joe Leon—you was acquainted with him?

A. I meet him same time he was in Douglas but I no see him before.

Q. Now, did you know him, in 1903, before he got killed?

A. Yes, I talk two, three times and we talk when he get off shift and he talk about going to old country.

Q. Well, you saw him?

A. I see him every day or so.

Q. Did you see him and talk to him often?

A. Not every day. He was working—three, four times he come to cabin.

Q. Did he have a family? A. He say so.

(Testimony of Joe Pazetti.)

Q. Where did he say his family was?

A. He say they are in California.

Mr. COBB.—We object to this line of testimony for the reason that it is wholly irrelevant. This is not a suit brought by his family; it is brought by Mr. Jennings, as administrator of the estate.

COURT.—I think the objection ought to be sustained.

Q. When in 1903 did Joe Leon come to Douglas?

A. In the spring maybe fifteen, twenty days before now.

Q. In the spring? A. Yes, sir.

Q. What kind of a looking man was Joe Leon—was he a large man or small man?

A. He was not small man—hundred seventy-five, maybe hundred eighty pound. Very fine looking man—heavy man. He is twenty, twenty-three. I no can look at man and tell just right. Somebody look twenty-four, twenty-two—somebody same look eighteen, some twenty, one two, three years old; some look that.

Q. You say he was about twenty years old?

A. Something like that.

Q. How much did you say he weighed?

A. Hundred eighty, hundred seventy-five pounds; something like that.

Q. Did you see him a short time before he was killed? A. He talk with me, he say—

Q. Just answer the question. Did you see him?

A. Maybe three or four days.

(Testimony of Joe Pazetti.)

Q. When you saw him that time, was he strong and healthy?

A. He says he going to start to work, he no idle man. He was strong man.

Q. You have answered the question.

Q. You say you saw him two or three days before he was killed and he was strong and healthy?

A. He was healthy, I believe. I don't know he said he was feeling good. He talk about his father and mother—

Q. Do you know whether he was an educated man or not?

A. Yes, he says he go to school four years.

That is all.

Cross-examination.

(By Mr. COBB.)

Q. Joe Leon was a comparatively young man then?

A. A young man—I never work with him at same time.

Q. You are an Italian?

A. I was Slavonian—I Italian no.

Q. What was Joe Leon?

A. Maybe he was born in America.

Q. Was he an Italian?

A. He born here in United States.

Q. Was you present when he was born?

A. In Portland.

Q. How do you know he was born in America?

A. He told me and his father and mother—

(Testimony of Joe Pazetti.)

Mr. JENNINGS.—We object to that; ask that it be stricken out as hearsay. I could not get at what he was driving at.

COURT.—Proceed.

Q. Now, I will ask you questions and you must answer them and when you have done that you must quit. Now, you say you knew Joe Leon pretty well?

A. He pretty good friend of mine.

Q. Now, you say you knew Joe Leon pretty well—what were his habits—did you ever go on a spree with him?

A. We spree—we meet when he come in after work—he get pretty good. He talk Italian.

Q. Did you ever go on a spree with Joe Leon?

A. No, no.

Q. Did you ever drink with him?

A. No, nothing like that. I talk with him—That is all.

[Testimony of Tom Tatum.]

TOM TATUM, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JENNINGS.)

Q. Please state your name.

A. Tom Tatum.

Q. Where do you reside?

A. In Treadwell on Douglas Island.

Q. What is your occupation?

A. Stationary engineer.

(Testimony of Tom Tatum.)

Q. For whom?

A. The Alaska-Treadwell Gold Mining Company.

Q. The defendant in this case?

A. Yes, sir.

Q. What is your particular occupation at this time?

A. Well, I run the air-compressor and electric light station.

Q. You are the engineer of the air-compressor and electric light station? A. Yes, sir.

Q. What was your occupation on August 5, 1903?

A. Well, I ran—I was running the engine for the hoisting plant, the ore hoist.

Q. The ore hoist of the main shaft of the Treadwell mine? A. Yes, sir.

Q. Were you on the night shift or day shift?

A. I was on the night shift.

Q. Please describe, if you can, the collar of that shaft. How did the shaft look at the surface of the ground—how many compartments were in it?

A. Four.

Q. What is the first one—what is on one end?

A. Well, on one end there is two compartments where they hoist the ore skips. We hoist ore on the first two compartments on the left of the shaft.

Q. What comes next? A. The cage.

Q. That is what they call the man hoist?

A. I believe that is what they call it.

Q. They have one which they call the manway?

A. That was for the cage for hoisting the men.

(Testimony of Tom Tatum.)

Q. What is next to the manway?

A. The pump shaft.

Q. What is next to it on the other side?

A. Nothing.

Q. The manway is between the pipe or pump compartment and what? A. The skip.

Q. There is an ore hoist compartment next to the manway on one side? A. Yes, sir.

Q. How many ore compartments are next to the manway? A. Two.

Q. Next to the manway—adjacent to the manway? A. Yes—two.

Q. Two or one?

A. Two compartments and then comes the cage compartment.

Q. The cage compartment is what I called the manway? A. Yes, sir.

Q. Now, next to the manway what is there?

A. The pump compartment.

Q. On the other side? A. The two skips.

Q. The two skips do not touch the manway?

A. No, sir.

Q. Then there is only one ore compartment next to the manway? A. Yes.

Q. Then next to that ore compartment—farther from the manway there is another ore compartment?

A. Yes, sir.

Q. Those two ore compartments, then, are side by side and then comes the manway and then the pump shaft? A. Yes, sir.

(Testimony of Tom Tatum.)

Q. Was that shaft timbered? A. Yes, sir.

Q. Did the timber run all the way down the shaft?

A. They ran down to the bulkhead.

Q. Between the manway and that ore compartment was there any timbers going from the top to the bottom of the manway?

A. There were cross timbers and pieces set in there.

Q. The manway was lagged up—separated from the ore compartment? A. Yes, sir.

Q. Between the ore compartment and the manway there was just a hollow set of timbers?

A. Yes, sir.

Q. You say you were the engineer of the hoist on the 5th of August, 1903? A. Yes, sir.

Q. I wish you would state what the hoist was doing—what business was it engaged in at that time?

A. Hoisting ore from the lower level.

Q. For the Treadwell Mining Company, the defendant in this case? A. Yes, sir.

Q. Explain to the jury how that ore is hoisted—what instrumentality are used.

A. They hoist it out of the mine in skips—what they call skips—big iron buckets and they go up to where they are dumped.

Q. These ore skips—what are they attached to?

A. A heavy steel wire rope.

Q. When what becomes of the rope?

A. Well, it is wound up on the drum—shaft of the engine—the hoist engine.

(Testimony of Tom Tatum.)

Q. Does it go over a sheave-wheel?

A. Yes, sir.

Q. Where is that sheave-wheel?

A. At the top of the shaft-house.

Q. Up above the mouth of the shaft?

A. Yes, sir.

Q. And that is how far—the sheave-wheel from the surface of the earth? A. About sixty feet.

Q. This cable, as I understand you, goes over the sheave-wheel? A. Yes, sir.

Q. Then what becomes of it ?

A. One end is attached to the skip and the other end to the drum shaft of the engine.

Q. Over the sheave-wheel to the drum shaft of the engine? A. Yes, sir.

Q. What is a sheave-wheel, Mr. Tatum?

A. It is a wheel flanged on each side for the rope to run in—to guide the rope.

Q. When you say rope you mean this wire cable?

A. Yes, sir.

Q. How large a sheave-wheel was being used?

A. Six feet, I believe it was.

Q. How many spokes did it have?

A. I really don't know. I think about six spokes.

Q. Look at this paper which I hand you and say if that looks anything like that sheave-wheel?

A. Yes, sir, it is something similar.

Q. This is a picture of it, is it not?

A. No, sir, it is something similar.

Q. Is it not very similar?

(Testimony of Tom Tatum.)

Mr. COBB.—We object to his leading the witness.

COURT.—Objection overruled. Go ahead.

Q. This looks very much like it?

A. Yes, something similar.

Mr. JENNINGS.—If the Court please, I wish to offer this picture as explanatory and illustrative of this witness' testimony so that the jury may see what kind of a wheel it was.

Mr. COBB.—We object to it because it has been tampered with and marked up in all kinds of ways. It is not a picture of anything as it stands.

COURT.—It is simply offered as illustrative of this witness' testimony.

Mr. COBB.—We object to it as not the best evidence. They could have had a photograph of it if they wanted it.

COURT.—Objection overruled.

(Marked Plaintiff's Exhibit No. 10.)

Mr. COBB.—We desire an exception.

Mr. JENNINGS.—I would like to submit this to the jury, if the Court please.

Q. Now, you say you were attending to your duty in charge of that hoist hoisting ore out of that shaft on the 5th of August, 1903? A. Yes, sir.

Q. You have just described how the ore was hoisted at that time? A. Yes, sir.

Q. What happened on the 5th of August, 1903, about one o'clock at night while you were on duty there? A. Well, it was nearly two o'clock.

Q. All right, about two o'clock?

(Testimony of Tom Tatum.)

A. Well, the rope broke and the skip fell.

Q. What was the first thing that you noticed there out of the ordinary that called your attention to the fact that something was wrong?

A. Well, the engine started to run away and race. I saw the rope when it came down and wound up quickly on the drum.

Q. Was that skip which was being hoisted at that time loaded or empty? A. Loaded.

Q. About how much of a load?

A. Well, I believe they claimed it would hold four tons.

Q. Hold four tons? A. Yes, sir.

Q. How much would the skip itself weigh?

A. I am not certain about that. I believe they said it weighed something like two tons.

Q. That was your understanding that the skip weighed two tons and the load weighed four tons?

A. Yes, sir.

Q. About where in that shaft was the load at the time you noticed that there was something wrong and the engine commenced to race?

A. Well, it was at the two hundred and twenty foot level.

Q. Two hundred and twenty foot level?

A. Yes, sir, a little above it.

Q. You were a witness in the Ole Linge case?

A. Yes, sir.

Q. You did not testify that it was at the two hundred and twenty foot level then?

(Testimony of Tom Tatum.)

A. I believe so.

Q. I will read this to refresh your memory?

Mr. COBB.—We object to his using that transcript.

Mr. JENNINGS.—I want to refresh his memory as to what his testimony was on the other trial.

COURT.—Proceed.

Q. Didn't you testify on the other trial in the Ole Linge trial that this skip was about one hundred feet from the surface?

A. I think not; no, sir.

Q. Let me call your attention to this, Mr. Tatum. In answer to my question in that case didn't you testify as follows, in response to a question asked you by Mr. Maloney: How did you come to say that it was one hundred feet—are you guessing at that also? A. One reason is that it was somewhere near that point. I recollect that I always shut off the steam and then the skip would run in itself, and I know when I first noticed something being wrong that it was just about this point. Q. Just about the 100 foot point? A. Yes, sir. Q. At the time of the accident you did not look at the indicator? A. No, sir, I did not have time to look at it.

A. Perhaps if you have got it down that way I might have.

Q. What will you say, were you telling the truth then or were you telling it just now?

A. About that I probably was mistaken.

Q. When? A. The first time.

(Testimony of Tom Tatum.)

Q. Do you think your memory is any better now than it was two years ago about something that happened two years ago? A. I don't think so.

Q. Don't you know that that skip was at about the one hundred foot level when it fell?

A. Well, there was nothing on it to tell.

Q. About one hundred feet from the surface?

A. No, sir, I don't know it.

Q. Do you want to tell this jury that the skip was at the two hundred and twenty foot level when it fell?

Mr. COBB.—We object to that. I think the witness is a fair witness and it is an immaterial point any way.

Mr. JENNINGS.—I think it is very material. I think it is very clearly shown that he is a hostile witness because he has changed his testimony from what it was in the last case.

COURT.—I do not notice any symptoms of hostility. Of course, he has made some changes in his testimony but that is a point for the jury to determine. They understand that. Go ahead.

Q. Do you want to tell the jury that the skip was at the two hundred and twenty foot level?

A. I think it was just above that.

Q. How far above?

A. I can hardly say about that. When I was hoisting from that level instead of running it up higher I usually shut off the steam about that point.

(Testimony of Tom Tatum.)

Q. Why did you say at the other trial that you shut off the steam at the one hundred foot level?

A. I don't know.

Q. Was your memory any better two years ago than it is now about things that happened two years before that?

A. I can't say that—I don't know.

Q. Have you talked with Mr. Kinzie since that trial? A. Yes, many times.

Q. What refreshed your memory so that you state that that skip was not about one hundred feet from the surface?

A. Well, I can't say; I don't know how I came to make that statement.

Q. Did it ever occur to you that you made it because it was true? A. No, sir.

Q. Did you ever talk to Mr. Cobb about the case?

A. No, sir, to none of the parties about the case.

Q. To Mr. Cobb? A. No, sir.

Q. Nor Mr. Maloney, nor Mr. Kinzie?

A. No, sir.

Q. Did you know it was important in this case to locate the distance that that skip fell?

A. Well, I didn't hardly consider the matter. I don't know. I did not think.

Q. You did not think. Mr. Tatum, you are working for the Alaska Treadwell Gold Mining Company?

A. Yes, sir.

Q. You are a married man? A. Yes, sir.

(Testimony of Tom Tatum.)

Q. Have you ever been told by Mr. Kinzie that if your testimony was not satisfactory to the company you would be discharged?

A. I have not. Mr. Kinzie has never said anything to me about it since the last trial at all about the case in any way.

Q. Let me refresh your memory again. What I was calling your attention to before was on Mr. Cobb's cross-examination. I will ask you if you did not say in answer to my question that it was about one hundred feet from the top of the top of the shaft —from the surface, didn't you?

A. Well, I really don't know whether I did or not.

Q. Which statement do you want to stand by—that it was at the two hundred and twenty foot level?

A. Yes, sir.

Q. How do you know that?

A. As I said that was about the point where I would shut off the steam so that the weight of the traveling skip—there would be motion enough to carry it on in.

Q. You remember in the last trial that it was one hundred feet because that was the point you shut off the steam too?

A. I remember about where I usually shut off the steam. Just above that level.

Q. How far above?

A. Perhaps something like fifty feet.

Q. Were you tending to your business in the usual and ordinary way at that time?

(Testimony of Tom Tatum.)

A. Yes, sir, I was.

Q. Was you careless at all? A. No, sir.

Q. You did not forget and let the skip run up to the sheave-wheel? A. No, sir, it was not.

Q. It was no fault of your own?

A. I had no reason to believe it was or any one else around the works.

That is all.

Cross-examination.

(By Mr. COBB.)

Q. No one connected with the company has ever suggested to you that you ought to tell anything except the whole truth about this matter?

A. No, sir, they have not.

Q. Were you ever up at this sheave-wheel?

A. Yes, sir.

Mr. JENNINGS.—I forgot to ask one question.

COURT.—Very well, go ahead.

(By Mr. JENNINGS.)

Q. How did you know that the sheave-wheel broke? A. Well, Mr. Noonan told me—

Mr. COBB.—We object to what he was told.

Mr. JENNINGS.—I asked him how he knew it was broken.

COURT.—He may tell how he knew. He may not know.

(Testimony of Tom Tatum.)

Q. Mr. Noonan told you? A. Yes, sir.

Q. Did you see it after it was broken?

A. I saw it afterwards.

Q. How long afterwards?

A. Perhaps an hour.

Q. How much of the sheave-wheel was broken?

A. To the best of my recollection about one-fourth of the rim broken out.

Q. Can you describe those skips?

A. Well, they were big iron buckets; you could not call it a bucket either. They were built to conform to the shape of the shaft. They were—do you mean the length?

Q. Just describe them the best you can. What was on the skip—what was on the sides?

A. Iron running up along the sides—guides.

Q. Were they called runners? A. Yes, sir.

Q. What else?

A. Iron pieces came up and swung into this frame and they acted as guides.

Q. What was that for?

A. The runner, that worked in the runner.

Q. That was all? A. Yes, sir.

Q. About what was the size of them?

A. Well, the guides were—I think about four inches, perhaps.

Q. About four inches?

(Testimony of Tom Tatum.)

A. Four or six inches perhaps about six inches I think.

That is all.

Cross-examination.

(By Mr. COBB.)

Q. When did you notice the sheave-wheel last before the accident?

A. Well, you see on my shift—we always went up when we would go off shift and make an examination of the wheel and I came on at eleven o'clock that night and you see there was eleven—it was seven o'clock—it was seven o'clock the morning before that I examined it last.

Q. Seven o'clock the morning before the accident did you inspect the wheel?

A. That is like we usually did.

Q. Examine everything to see that it is in proper order?

Mr. JENNINGS.—Objected to as not proper cross-examination.

COURT.—Overruled.

A. Yes, sir.

Q. Found nothing wrong?

Mr. JENNINGS.—Objected to as not proper cross-examination.

COURT.—Overruled.

A. No, sir.

(Testimony of Tom Tatum.)

Q. In the course of this inspection you examined this cable? A. Yes, sir.

Q. Was it a wire cable?

A. A one and one-eighth inch wire steel cable.

Q. What is called a plow steel cable?

A. That I don't know.

Q. It was a steel cable? A. Yes, sir.

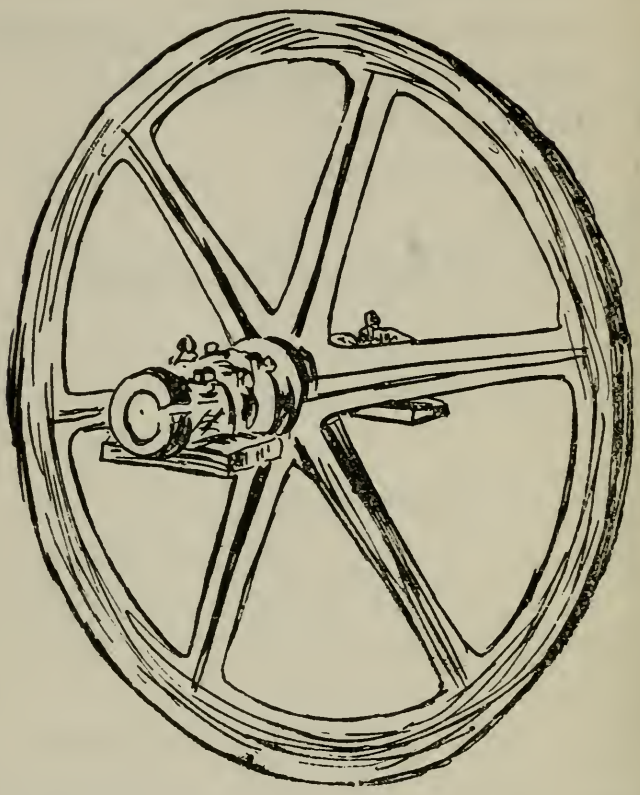
That is all.

Plaintiff's Exhibit No. 10 was as follows:

Plaintiff's Exhibit No. 10.

Fraser & Chalmers Sheave-wheel, with Shaft and Boxes.

Plate 1088.



Sheaves for round rope. May 13, 1907. Plff. Exhibit No. 10. Cause No. 460-A. A. W. Fox.

[Endorsed]: 460-A. Jennings Admr. vs. Alaska Treadwell G. M. Co. Picture of a Sheave-wheel. Plaintiff's Exhibit Received in Evidence. Stenographer.

The deposition of Nels Nelson was then read as follows:

[Deposition of Nels Nelson.]

NELS NELSON, being duly sworn, testified as follows.

Direct Examination.

(By Mr. JENNINGS.)

Q. Please state your name.

A. Nels Nelson.

Q. What is your occupation, Mr. Nelson?

A. Carpenter.

Q. In whose employ are you?

A. The Treadwell Gold Mining Company.

Q. How long have you been in their employ?

A. Off and on for three and a half—pretty near four—years.

Q. During all of that time in what capacity have you been employed?

A. Framing timbers for the Treadwell Gold Mining Company.

Q. How long have you been a carpenter?

A. It's about twenty years since I served my time in the Old Country.

Q. State whether or not you have been engaged as a carpenter pretty much since that time?

A. Yes, sir.

Q. In whose employ were you on the 4th and 5th days of August, of the year 1903?

Q. Alaska Treadwell Gold Mining Company?

A. Yes, sir; Tom Noonan hired me, the foreman of the Treadwell Mine.

(Deposition of Nels Nelson.)

Q. In what capacity were you employed at that time? A. Framing shaft timbers.

Q. Do you recall an accident at the Alaska Treadwell Gold Mining Company in the shaft of the Treadwell Mine, on which occurrence a skip fell down the shaft?

A. I heard it, but I don't know anything about it. I came in the morning to work, and quit there that morning; I heard that a skip fell down, but I didn't know anything about it.

Q. Are you familiar with the shaft of the Treadwell Mine over there where the skip fell—is said to have fallen?

A. Yes, sir, I have been all through the shaft.

Q. I wish you would describe that shaft as near as you can.

A. Well, it's a four-department shaft—

Q. Four compartments?

A. Yes, sir; one of the departments don't go up to the top; the sinking shaft only goes to the 600-foot level. Three of the departments goes to the top, two rock departments and the man department—cage hoist.

Q. Do you know where the men were engaged in sinking the shaft on that 5th day of August—where the place was? A. In the bottom.

Q. Of the Treadwell shaft? A. Yes, sir.

Q. Now, what was there between the men at the bottom of that shaft and the top or collar of the shaft?

(Deposition of Nels Nelson.)

A. Well, there was a bulkhead on the 750-foot level.

Q. How many bulkheads were there between the bottom of that shaft and the top?

A. The main bulkhead was on the 750-foot level, and there was a platform underneath to catch all of the small rock coming down; I don't call it a bulkhead, just a platform to keep anything small from coming down on the men.

Q. As you go down the shaft, the compartment next to the man-cage as you go down that, what is the first obstruction you strike?

A. Going down in the working department?

Q. No—what is there between the collar of the shaft and the bottom of the shaft?

A. A bulkhead, of course.

Q. How many bulkheads?

A. Only one main bulkhead, and there is a platform in where they raise the man skip.

Q. Where is the main bulkhead?

A. At the 750-foot level.

Q. Between the 750-foot level and the top or collar of the shaft is there any obstruction?

A. No.

Q. State if you know who built the bulkhead at the 750-foot level in that Treadwell Mine?

A. I built it.

Q. Now, describe how it was built?

A. It was built out of twelve-by-twelves, fourteen feet long, bolted together with seven-eighth bolts on

(Deposition of Nels Nelson.)

each end, and standing in an angle of fifty-five degrees, three in each compartment.

Q. That is to say, three in the manway—

A. No, no; three in each of the working compartments.

Q. You say there were three timbers 12x12 and 14 feet long and bolted together? A. Yes, sir.

Q. Inclined at an angle of how much?

A. Fifty-five degrees—I couldn't swear exactly to a point, but I think it was 55°.

Q. In each of these ore compartments?

A. Yes, sir, working compartments—rock-hoisting compartments.

Q. What kind of timbers were they?

A. Twelve by twelves.

Q. No, I mean the nature of the wood?

A. Alaska spruce.

Q. What was the size of the compartments next to the manway, the ore compartment next to the manway?

A. Six by four—that is all of the compartments.

Q. Each one is that size? A. Yes, sir.

Q. Now, how were these timbers laid, lengthwise across the long dimensions of the compartment or the short dimension?

A. The long way of the compartment.

Q. Now, you spoke just now of another obstruction just beneath this main bulkhead?

A. Yes, sir.

Q. State what that was.

(Deposition of Nels Nelson.)

A. That was a platform for the skip to land; there was a skip-chute about sixty feet underneath the level where the ore bin is on the seven hundred level; they draw the ore from the seven hundred level in the skip-chute and get it in the rock-skip, hoist it up about sixty feet from the level—

Q. From this bulkhead? A. Yes, sir.

Q. Now, describe that obstruction—what is it?

A. Well, it was a platform laid to catch all the rock, anything small that came down so it wouldn't go down and hit the boys.

Q. What kind of timbers was it made of?

A. That was five by tens, Seattle fir, from the Seven Hundred.

Q. How many?

A. The compartment is four feet one way and six feet the other way; you can figure yourself how many it takes.

Q. Laid flat-ways, joined together?

A. Yes, sir.

Q. State what, if anything, there was between this last platform you speak of and the bottom of the shaft where the men were working?

A. Not that I known of—anything.

Q. State what, if anything, there was on the top of this main bulkhead that you have spoken of?

A. Nothing that I know of.

Q. Do you know in which compartment the skip fell? A. No, I don't.

Q. Didn't you see it the next morning?

(Deposition of Nels Nelson.)

A. No, I quit work that same morning.

Q. Didn't you see the broken skip after that?

A. I didn't see nothing; I just called for my time and got my time and went down from there—didn't stay there at all.

Q. Now, let me get this a little clearer, Mr. Nelson. In speaking of the ore compartments next to the manway, that is the one I referred to; is that the one you're speaking of concerning which you testified as to the bulkhead?

A. Well, both of them.

Q. Both of the ore compartments?

A. Yes, sir.

Q. And I understood you to state that outside of the bulkhead you just testified to, and outside of the little platform you just testified to, there wasn't any other bulkhead in that compartment at all?

A. Well, it was a bulkhead above the 750-level, but it was supposed that was going to take ore from skip-chute below; that would have to be taken out with the buckets.

Q. Was there a bulkhead at the 750-level?

A. Yes.

Q. What kind of a bulkhead was that?

A. Three by twelve.

Q. Was there any other bulkhead at all?

A. None at all, except that platform.

Q. Then there were only two things in the shape of a bulkhead or obstruction between the collar of the shaft and the bottom of the shaft?

(Deposition of Nels Nelson.)

A. Yes, sir.

Q. Now, Mr. Nelson, state whether or not you ever saw the shive-wheel that operated the skip in the ore compartment next to the manway?

A. Yes, I was called up a month before the accident happened, something like that, called up by—

Q. Well, strike all that out. I understood you to say you constructed that bulkhead?

A. Yes, sir.

Q. Who told you to construct it?

A. Tom Noonan.

Q. Who told you how to construct it?

A. Tom Noonan.

Q. And who was Tom Noonan?

A. He was foreman of the Treadwell Mine.

Q. Do you know how much weight that bulkhead would sustain?

A. No, I couldn't tell you; that's too much for em.

Q. Now, I'll ask you if you ever saw the shive-wheel—describe, first, as near as you can, Mr. Nelson, how the ore was hoisted out of that shaft; describe the skips, and cable, and shive-wheels, if there was any, the engine and the drum—just in a general way in your own language describe how the hoisting of ore was conducted on August 4th and 5th, 1905.

A. Well, there's a hoist on top, I don't know how many horse-power, but she is supposed to handle the skip; and a drum, and a cable that goes over the

(Deposition of Nels Nelson.)

shive-wheel that is plumb with the shaft, and the cable goes down in the shaft.

Q. And a skip on the end of the cable?

A. Yes, sir.

Q. State whether or not you ever saw the shive-wheel over the ore compartment next to the manway?

A. I was called up a month or three weeks, I couldn't say exactly, something like that, before this accident happened. There was a Slavonian that was working up in the crusher, and he couldn't talk English, and he was making such a noise to the foreman, and the foreman came to me and called me to go up there with him; he thought there was something broken in the dump, or something, and he took up to the shive-wheel, and there was a piece broken out and Tom Noonan stopped the hoist right there.

Q. You say "he" came down; who was he?

A. Tom Noonan.

Q. The same man you were just talking about, the foreman? A. Yes, sir.

Q. And who went up with you and Tom Noonan to look at the wheel?

A. Mr. Noonan and that Slavonian.

Q. Where did you go?

A. Up to the shive-wheel.

Q. How far from where you were?

A. Between sixty or seventy feet; I couldn't say exactly.

Q. Up above the collar of the shaft?

A. Yes, sir.

(Deposition of Nels Nelson.)

Q. And what did you find there?

A. Found a piece broken off of the shive-wheel.

Q. Describe that piece as near as you can?

A. I should judge it was from twelve to fourteen inches long.

Q. How wide was it?

A. The width I couldn't say that; I am talking about the length.

Q. Can you give any estimate as to how wide it was?

A. No; it was only five or six minutes I stopped there, and then I went down to my work.

Q. Off of what part of the shive-wheel was that broken? A. Off of the flange.

Q. You say Noonan stopped the works?

A. Yes, sir, stopped it right there.

Q. State whether or not he stopped the skips in both of the ore compartments, or only one of them.

A. He stopped the hoist altogether.

Q. You mean he stopped the ore-hoists?

A. Yes, sir.

Q. State whether or not he stopped the manway hoist?

A. Oh, no, he couldn't stop that man-cage; that's on a different shive-wheel.

Q. State how long, if you know, he kept the two ore-hoists stopped?

A. I couldn't tell you; I went down to my work and I didn't have the chance to see or be called down; I was working in my shop then, and I couldn't tell about what was going on after I came down.

(Deposition of Nels Nelson.)

Counsel for the defendant moves to strike out all the testimony of this witness as to the shive-wheel that he saw three weeks or a month before the accident, because irrelevant and immaterial unless connected up and shown to be the shive-wheel in use at the time of the accident.

Overruled. Plaintiff promises to correct.

Q. I say, referring again to the bulkhead which you have testified to and which you call the main bulkhead at the 750-level, I understood you to state that it was lifted up against the walls when the skip was in use; is that correct? A. No.

Q. You mean that little bulkhead underneath—wait a minute. (Counsel consults Mr. Cheney.) I want to ask you this question: Between the collar of that shaft of the compartment—between the collar of the ore compartment next to the manway and between the place where the men were working at the bottom of the shaft, what, if any, obstruction in the way of bulkheads or platforms were there?

Objected to by counsel for defendant as repetition.

Overruled.

A. Well, from the collar of the shaft and down to its bottom, between the cage and the rock-hoist, its all lined up from top to bottom.

Q. What I am trying to get at, Mr. Nelson, is this: Between the collar of the shaft, in the ore compartment next to the manway and the place where the men were working at the bottom of the shaft, what, if any, obstruction was there in the way of a bulkhead—or platform or of any other nature?

(Deposition of Nels Nelson.)

A. The same as I told you before, a bulkhead at the 750-level and the platform below.

Q. That's all there was? A. Yes, sir.

By Mr. CHENEY.—You mean the 750-foot level—you have said the 700-level several times?

A. Yes, sir.

Q. You spoke when you were testifying a few moments ago about the shaft, about the bulkhead that was opened up when the skip was working up and down—explain that?

A. Well, that's on the 750-foot level, the same as I am talking about; and that was arranged with a block, two by twelve, to pull that up when they wanted to load the skip, at the 750-skip chute, and to let it down, you know, and then let it back again to protect the rock or anything from going on the lower bulkhead.

Q. Yes, sir, raised back and forth, wasn't it?

A. Yes, sir.

Q. Then when they raised ore from the 750-foot level as you have described, the bulkhead you have described was opened up?

A. Yes, sir; raised back and forth.

Q. And then after the skip went by, it was put back in place? A. Yes, sir, closed.

By Mr. JENNINGS.—That's the bulkhead you have just been testifying about with the three timbers? A. Yes, sir.

Q. Now, Mr. Nelson, between that bulkhead and the bottom of the shaft, how were the sides of the

(Deposition of Nels Nelson.)

compartemtns timbered—were they timbered at all in the first place, and if so, describe just how it was?

A. You mean how were they framed, or the size of them?

Q. Well, both.

A. The size of them is four by six, the size of the compartment. And the timbers, the main wall-plates on each side is framed; they are an inch on each side, and its made of a cross-timber on each side with a bob-tail driven down so it can't come up, and the posts between the sets of the plates so the block can't come up without some break—the whole shaft is framed that way.

Q. From top to bottom? A. Yes, sir.

Q. I don't know whether I asked you or not; if I didn't I will now ask you to get it clear in the record: State over what ore compartment the shive-wheel you and Tom Noonan went to look at and found the piece broken out of was located?

A. Next to the man-cage.

Q. The ore compartment next to the man-hoist?

A. Yes, sir.

Q. I understood you to say you didn't know for sure that was the compartment in which the accident occurred?

A. No, I don't know for sure; I wasn't there and didn't look at it.

Cross-examination.

By Mr. COBB.—You say you built this bulkhead?

A. Yes, sir.

Q. It was built of timbers twelve by twelve?

(Deposition of Nels Nelson.)

A. Yes, sir.

Q. You did a good job of it, didn't you?

A. Yes, sir.

Q. It was properly built? A. Properly.

Q. Now, in building the bulkhead, the lower end of the timbers was let into a hitch in the rock?

A. Yes, sir, into a hitch on the other side of the shaft and the upper end was laying against the rock.

Q. And a hitch cut in for it to rest in?

A. Yes, sir.

Q. And also cut in a place for them to rest in at the upper end? A. Yes, sir.

Q. These timbers were put in, bolted together as you describe, filled the entire compartment across?

A. Yes, sir. Between the runners for the skip.

Q. They had to be put in the long way of the shaft so as to turn anything coming down out into the station?

A. Throw it into the station; yes, sir.

Q. Out of the shaft? A. Yes.

Q. That was the purpose for which they were put at an incline?

Objected to by counsel for plaintiff as not proper cross-examination, and we move to strike out the testimony of the witness as to the bulkhead being properly built and the testimony "so as to turn anything into the station" as not proper cross-examination, and the objection was not sooner made because the question was answered before objection could be made.

Overruled.

(Deposition of Nels Nelson.)

Q. Was that a reasonably safe bulkhead?

Objected to as not proper cross-examination.

Overruled.

A. I went under it and worked myself; if I thought it wasn't safe I wouldn't go down there.

Q. You say the platform down below was constructed of what size timbers?

A. Ten by five, covered both compartments as tight as they could be.

Q. Did you built that? A. Yes, sir.

Q. Was that properly constructed?

Objected to by counsel for plaintiff as not proper cross-examination.

Overruled.

A. Yes, sir.

Redirect Examination.

By Mr. JENNINGS.—Mr. Nelson, when you say that bulkhead was properly built, you mean it was built properly according to the instructions you got to build it, don't you?

A. Yes, sir. The instructions I had to build it.

Q. They told you how to build it?

A. Yes, sir.

Q. Tom Noonan told you, didn't he?

Objected to by counsel for defendant as leading.

Overruled.

Q. Who told you to build it and how to build it?

Objected to as repetition.

Overruled.

A. Tom Noonan.

(Deposition of Nels Nelson.)

Q. The man you just testified to. Mr. Cobb has asked you what the purpose of the company was in building it—do you know of your own knowledge what the purpose was in building it?

A. The bulkhead?

Q. Yes, sir.

A. To save the falling skip or anything from coming down.

Q. It wasn't sufficient to keep a falling skip from coming down, was it?

Objected to by counsel for defendant as leading; calls for the conclusion of the witness upon facts that developed subsequent to the accident.

Overruled.

A. Well, for most anything.

Q. Mr. Nelson, do you know how much weight that bulkhead would sustain?

A. No, I couldn't tell that.

Q. Do you know much the breaking strength of those timbers you have just described were?

A. No, sir.

Q. Do you know the average weight of a loaded skip such as was in use on the night of this accident was?

Objected to by counsel for defendant as not proper redirect examination.

Overruled.

A. No, I couldn't say; that's out of my line of business; I don't know exactly how big the skip was and I don't know how much ore it would hold—that's out of my line of business.

(Deposition of Nels Nelson.)

Q. Then are you prepared to say that bulkhead was properly built and was sufficient to sustain the weight of the falling skip if you don't know the breaking strength of the timbers and don't know the weight of the skip? A. How could I know?

Objected to by counsel for defendant as not proper redirect examination, and calls for the conclusion of the witness on facts subsequent to the accident.

Overruled.

Q. My question is, do you know? A. No.

Q. Then when you say it was properly built and was sufficient to turn anything into the landing, you are not speaking of your own knowledge, are you?

A. No.

Objected to by counsel for defendant because calling for the conclusion of the witness on matters not asked about.

Overruled.

Recross-examination.

By Mr. COBB.—You say you're a carpenter?

A. Yes, sir.

Q. Had a good deal of experience in mine timbering? A. Yes, sir.

Q. You know how a bulkhead should be constructed? A. Yes, sir.

Q. And you did construct this one you say properly? A. Yes, sir.

Redirect Examination.

By Mr. JENNINGS.—According to the directions given you—is that the fact?

(Testimony of R. A. Kinzie.)

A. I constructed that—he gave me an understanding how to build it.

Q. And you built it that way?

A. I built it the best I knew how.

Q. You say you worked under the bulkhead?

A. Yes, sir.

[Testimony of Robert A. Kinzie.]

R. A. KINZIE, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JENNINGS.)

Q. Please state your name.

A. Robert A. Kinzie.

Q. What is your occupation?

A. Superintendent of the Treadwell mines.

Q. How long have you been superintendent of the Alaska Treadwell Gold Mining Company?

A. About two and a half years.

Q. What position did you occupy with that company, if any, on August 5, 1903?

A. Assistant superintendent.

Q. When did you become assistant superintendent?

A. Why I arrived here, I think, on the 1st of February, 1901.

Q. When? A. 1901, February 1, 1901.

Q. Have you been assistant superintendent from February 1, 1901, to August 5, 1903?

A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. Have you had any experience as a mining engineer as a mining and mechanical engineer?

A. Yes, sir.

Q. With special reference to machinery and mines operated by means of hoists—anything of that kind? A. Yes, sir.

Q. You consider yourself an expert on mining machinery? A. To a certain extent, yes, sir.

Q. Tell me the names of some authorities on mining and mechanical engineering?

A. Mining engineering.

Q. Mechanical engineering.

A. Rankins is an authority on the application of steam and mechanical engineering. Merril is an authority on the application and strength of metals. State, I think, is the most modern authority on the strength of metals.

Q. I do not ask you particularly regarding the strength of metals. I ask you more in regard to engineering, mining and mechanical engineering.

A. Trautwine is an authority on civil engineering.

Q. Is he an authority on things he purports to treat on? A. Yes, sir.

Q. Do you know Molesworth?

A. No, sir, I do not.

Q. Never heard of that book?

A. No sir, I never did.

Q. Bow's works? A. No, sir.

Q. Never heard of it? A. No, sir.

Q. Well, I will refresh your memory by reading the title. Pocket-Book of Useful Formulae &

(Testimony of R. A. Kinzie.)

Memoranda for Civil and Mechanical Engineers by Sir Gulford L. Molesworth, Knight Commander of the Order of the Indian Empire, Fellow of the University of Calcutta, Member of the Institution of Civil Engineers, and Henry Bridges Molesworth, Member of the Institution of Civil Engineers, Twenty-fourth Edition, Revised and Enlarged. Does that refresh your memory.

A. I never heard of it.

Q. You say that Molesworth is not an authority on mechanical engineering?

A. I did not say any such thing.

Q. I am asking you? A. I don't know.

Q. You want to state to this jury on your oath that you never heard of Molesworth's book on engineering? A. I do.

Q. You never heard of it? A. No, sir.

Q. What school did you get your education in?

A. What school?

Q. Yes, sir. A. What do you mean?

Q. What school or university? Did you ever go to a university? A. Yes, sir.

Q. What school did you go to, then?

A. The University of California.

Q. That is where you got your technical mining education? A. Yes, sir.

Q. And you never heard of Molesworth?

A. I never hear of it.

Q. How about Troutline—is he a pretty good authority? A. Yes, sir.

(Testimony of R A. Kinzie.)

Q. Now, Mr. Kinzie, I will ask you what you think of this statement—

Mr. COBB.—We object to this method of examination.

Mr. JENNINGS.—This is a hostile witness, if your Honor please, and I wish to examine him on this work.

COURT.—Objection overruled. Exception allowed.

Q. Did you ever hear of Henry's work?

A. No, sir.

Q. And Molesworth—you never heard of?

A. No, sir.

Q. You do not want to say that he is not an authority? A. No.

Q. You only wish to say that you don't know anything about it? A. Yes, sir.

Q. Mr. Kinzie, where were you on the 5th of August, 1903? A. I was in Berner's Bay.

Q. What time did you leave Treadwell to go to Berner's Bay?

A. Two or three days previous to that.

Q. When did you return?

A. On the night of the fifth.

Q. Was that the night of the 5th or the night of the 6th?

A. That is the night following the night of the accident.

Q. You knew as assistant superintendent that men were working at the bottom of that shaft sinking the shaft deeper? A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. You had that bulkhead built that is the one which has been testified about?

A. Personally, no.

Q. The management had? A. Yes, sir.

Q. Did you have anything to do with it?

A. I did.

Q. Did you ever see it? A. Many times.

Q. At what angle was it inclined across the shaft? Was it at an angle of about forty-five degrees?

A. I should judge a little steeper.

Q. Just about forty-five degrees?

A. I should judge a little steeper. I can give you that record, if you like.

Q. Didn't you testify before that it was at an angle of forty-five or forty-six degrees?

A. Very likely I did.

Q. That is about right?

A. Somewhere along there.

Q. How long were the timbers between the two supports? A. Between the supports?

Q. Yes, between the supports.

A. From the edge of one hitch to the edge of the other I should say eleven or twelve feet.

Q. Well, then, the bottom must have passed on beyond the timbering of the shaft?

A. It hitched into the solid rock?

Q. Both ends? A. Both ends.

Q. And you say it was about eleven feet?

A. I should say approximately that.

(Testimony of R. A. Kinzie.)

Q. You heard some testimony a little while ago about a patched sheave-wheel—you had that put on there yourself? A. No, sir.

Q. Didn't you testify when you testified in the other case that way?

A. That I personally had it put on—I don't remember but I don't think so.

Q. Do you swear now that you did not so testify?

A. I do not.

Q. You might have said so?

A. I don't think so.

Q. Will you swear that you did not testify that way? A. No, sir.

Q. Is your memory better now than it was then?

A. I don't think so.

Q. Not any better now than it was then?

A. No.

Q. You won't swear that you did not testify that way a year ago—two years ago? A. No.

Q. Who was Tom Noonan?

A. Foreman of the Treadwell mine.

Q. He was the next man to you in charge of the Treadwell mine? A. Yes, sir.

Q. He was familiar with the details of that mine and the actual operation of it? A. Yes, sir.

Q. And had charge of it? A. Yes, sir.

Q. Men working under him? A. Yes, sir.

Q. Did you ever see this sheave-wheel which is alleged to have been broken? A. Yes, sir.

Q. When did you last see it?

(Testimony of R. A. Kinzie.)

A. It might have been a month it might have been less before the accident.

Q. When did you first see it?

A. When did I first see it? About six years ago.

Q. Where did you see it six years ago?

A. In the head frame.

Q. Six years ago?

A. In the spring of 1901.

Q. Was the sheave-wheel there when you came up here? A. Yes, sir.

Q. When was that sheave-wheel put in there?

A. It was installed before I came there.

Q. How long?

A. I don't know of my own knowledge.

Q. You informed yourself as to the condition of the machinery and the length of time it had been in use in the mine? A. Yes, sir.

Q. How long did you find that it had been in use?

A. Since 1898.

Q. Was that put up there when—at the original installation of that shaft house?

A. How is that?

Q. Had there been any other sheave-wheel up there before that sheave-wheel was installed?

A. I understand there was.

Q. You understood there was?

A. Yes, sir.

Q. What kind of a sheave-wheel—was it a six-foot wheel? A. I don't know.

Q. You don't know anything about before 1898?

A. That was before I came here.

(Testimony of R. A. Kinzie.)

Q. But when you got there and inquired about it you found that it was installed at that time?

A. It was installed at that time I think—1898—I am pretty sure it was in 1898.

Q. I wish you would describe those skips as to their general dimensions and appearance?

A. The skips?

Q. Yes. A. What do you mean by skip?

Q. The bucket used for hoisting ore?

A. The bucket itself?

Q. Yes.

A. The buckets are made of half-inch boiler plates in right-angle cross-sections and would measure about six feet deep, and—let's see—a little less than three feet wide and something like four feet in length on the longer side. They are put on in cross-sections—laid longitudinally.

Q. What was on the sides of the skip?

A. On the side of the skip?

Q. Yes. A. Half-inch boiler plate.

Q. I don't mean that—I mean besides the boiler plate?

A. Yes, two horns on the top at that time eight inches up—three inches by one used for the automatic dumping of the skip.

Q. Was there any guides on the skip?

A. No.

Q. Not on the skip? A. No.

Q. What were they on?

A. On a sort of chair.

(Testimony of R. A. Kinzie.)

Q. Didn't it have a guide or runner on the side?

A. On the chair?

Q. That was a frame around the skip?

A. Yes, that had a runner.

Q. A runner or guide? A. Not a guide.

Q. I believe Mr. Tatum called it a guide.

A. The wooden form that the runner runs in is the guide.

Q. That is on the side of the shaft?

A. Yes, sir.

Q. Did that extend from top to bottom of the shaft? A. No, not quite.

Q. What are they made of?

A. The runners are made of one and a half inch angle iron, about four inches wide, riveted onto the side of the skip.

Q. What do you call that?

A. That is the runner.

Q. Did that extend from the top to the bottom of the shaft? A. No.

Q. How far did it extend?

A. From the top to the bottom of the skip.

Q. I am talking about the guide that the runner runs in?

A. That goes to the end of the timbering.

Q. How far was that from the bottom of the shaft?

A. Usually about forty or forty-five feet.

Q. That is above the bottom of the shaft?

A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. Then, as I understand you, from the top to the bottom or within forty feet of the bottom there were two guides or pieces of wood extending all the ways down for the runner to run in? A. Yes, sir.

Q. Now, Mr. Kinzie, about how far from the upper end—how far from the timber of the upper end of this bulkhead would the skip have struck as it came down?

A. That depends entirely on the incline of the bulkhead.

Q. Give us your estimate.

A. If it was forty-five degrees it would be halfway—if it was a greater angle it would be less or more as the case might be.

Q. About halfway between the two sides—between the timber on the two sides of the shaft?

A. Yes, well hardly either with the hitch on the east side—that was a great deal deeper—that was cut in deeper than the hitch on the upper side.

Q. You say not quite halfway—you mean halfway the length of the timber?

A. Yes—not much closer to one end.

Q. How far—give us your best estimate?

A. How do you mean?

Q. I will explain. Here is the bulkhead—this clear place is the space between the timbering of the shaft. Here is the hitch where the bulkhead rests—

(Testimony of R. A. Kinzie.)

now, how far from the center—how far from this end would the skip strike the bulkhead?

A. About halfway.

Q. You mean the space between the timber in the shaft? A. Yes, about six feet.

Q. This is six feet horizontally—now, on an incline it would be a little less? A. It would.

Q. About what would be the hypothenuse of that right angle triangle?

A. You mean the distance in the clear of the shaft?

Q. Yes, in the interior of the shaft between the timbers? A. I would say about nine feet.

Q. You were a witness in the case of Ole Linge—didn't you testify that it would be about eight feet?

A. I don't think so.

Q. Would you swear that you did not?

A. I would not swear to what I testified in that case.

Q. Didn't you testify in that case that way?

A. I don't remember.

Q. You want to swear now that it is nine feet?

A. That is what I said.

Q. Your memory was better then than it is now?

A. Not on this particular case or question rather I can figure that out in a minute.

(Testimony of R. A. Kinzie.)

Q. That is the same question that was asked you before? A. I don't know.

Q. You say that your memory is as good now as it was then?

A. I said in this particular case referring to the angle and hypothenuse of this kind it would be the same now as then—I could figure it out any time. Of course there are a good many things that I do not remember as well.

Q. There are a good many things that you do not remember? A. Yes.

Q. There are a good many things that you could remember better then than now?

A. I could not remember that any better then than now.

Q. How many levels are in that mine?

A. Now?

Q. How many were there at that time?

A. Five levels—six.

Q. Explain to the jury what a level is.

A. The best comparison I can make is that it is a place to store the ore and dump it into the skips.

Q. As I understand it, they are chambers which lead to the shaft? A. Yes, sir.

Q. About how large are they?

A. The full length of the shaft—they are various widths from twenty-six to thirty feet.

(Testimony of R. A. Kinzie.)

Q. In what?

A. In width and go back about forty feet—in there is a track a hundred and fifty—about two hundred feet.

Q. There were six levels at that time?

A. Yes, sir.

Q. All about the same size?

A. No, some were smaller.

Q. About how many were smaller?

A. Two or three were smaller.

Q. They were kind of bins? A. Yes.

Q. What were the sizes of those bins?

A. This bin would be in front of the shaft about twelve feet. They were about twenty feet wide by about eight feet long.

Q. That was a four compartment shaft?

A. A five compartment shaft.

Q. Between the manway and the ore hoist next to it—how was the manway separated from the ore hoist compartment? A. By timbers.

Q. What kind of timbers?

A. Eight by ten timbers, lagged in between.

Q. Between the man compartment and the ore compartment it was lagged up? A. Yes, sir.

Q. From the top to the bottom?

A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. And between the two ore compartments there was a kind of net work of timber?

A. Between the two what?

Q. The two compartments through which the ore is hoisted?

A. They were divided by timbers.

Q. That was not lagged up? A. No.

Q. Just a network of timber going on down to the bottom? A. That is all.

Q. You say there are three other compartments?

A. Yes, sir.

Q. What was there between the manway and any one of these three compartments?

A. Between the manway and what three compartments?

Q. The manway is the center compartment?

A. Yes, sir.

Q. Then on the right here is the ore compartment?

A. That is used for hoisting ore. Looking at it from which side?

Q. Looking at it from either side.

A. On the other side is the sinking compartment.

Q. Then what was on the right-hand side of the sinking compartment?

A. The pumping compartment.

Q. What was on the right-hand side of that?

(Testimony of R. A. Kinzie.)

A. The ground.

Q. That accounts for how many shafts?

COURT.—He has accounted for five.

Q. I wish you would draw a little map of those shafts and put the name of each compartment on it.

A. There is a drawing here which shows it a great deal better than I can draw it.

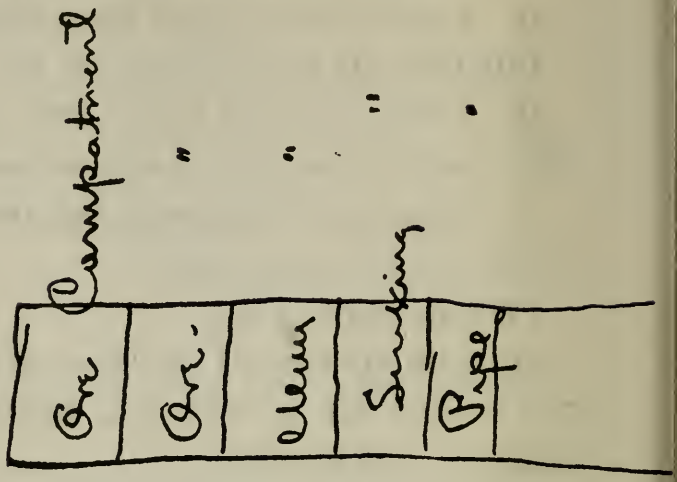
(Witness draws map.)

Mr. JENNINGS.—If the Court please, I would like to offer this in evidence as illustrative of the testimony of this witness.

COURT.—It may be admitted.

(Marked Plaintiff's Exhibit No. 12.)

Plaintiff's Exhibit No. 12.



~~Holt~~ May 13 1907
Plff Exhibit No 12
Cause No. 460 A.
A St Fox

(Testimony of R. A. Kinzie.)

Q. Now, take between these two ore compartments—was there any lagging there?

A. Lagging.

Q. Open network. Now, between the manway and the sinking compartment, was that open network or lagging?

A. Part lagged; most not lagged.

Q. Open work? A. Open work.

Q. Mr. Kinzie, who owned that sheave wheel which was broken?

A. The Alaska Treadwell Gold Mining Company.

Q. Who owned the drum and engine that was doing the hoisting?

A. The Alaska Treadwell Gold Mining Company.

Q. Who owned the steel cable?

A. The Alaska Treadwell Gold Mining Company.

Q. Whose ore and skip were being hoisted?

A. The Alaska Treadwell Gold Mining Company.

Q. Who was doing the hoisting?

A. The Alaska Treadwell Gold Mining Company.

Q. Whose was the bulkhead?

A. The Alaska Treadwell Gold Mining Company.

Q. The ore that was in the skip at the time it fell being hoisted?

A. The Alaska Treadwell Gold Mining Company.

Q. It belonged to that mining company, did it not? A. Yes, sir.

Q. What kind of a cable was it?

A. Wire cable.

Q. What kind of a wire cable?

(Testimony of R. A. Kinzie.)

A. Plow steel.

Q. How many strands? A. Six strands.

Q. How many wires to the strand?

A. Nineteen.

Q. What kind of a core did it have?

A. Hemp.

Q. How do you arrive at the momentum of a falling object?

A. If you know the weight and velocity with which it is going it can be figured out.

Q. The weight of the article multiplied by the number of feet which it falls would give you the number of foot pounds?

A. In some cases.

Q. Don't it in all cases?

A. No, sir; it does not.

Q. It depends on the elevation above the sea?

A. That does have a slight effect on it.

Q. Do you mean to tell this jury that the weight of an object multiplied by the fall or velocity does not give the momentum?

A. Not in all instances.

Q. When the weight is given and the height is given that would give the momentum?

A. No, it does not.

Q. If Molesworth and Trautwine say that they are not correct? A. They don't say that.

Mr. COBB.—I do not think it is proper for him a question like that and lead his own witness.

COURT.—I don't think he is leading him.

(Testimony of R. A. Kinzie.)

Mr. COBB.—We object on the further ground that he is cross-examining his own witness.

COURT.—I am inclined to sustain that objection, Mr. Jennings.

Q. Mr. Kinzie, did those runners work freely in the guides or the guides in the runner? I have not quite figured that out yet.

Mr. COBB.—There is no charge in this complaint that there was anything wrong with the guides or runners.

Mr. JENNINGS.—I am not asking it for that purpose.

COURT.—Objection overruled.

A. Yes, sir.

Q. Worked easily and freely—no friction there?

A. No, sir.

Q. I believe you described all there was on the outside of those skips. I believe you said there was nothing else on them except those guides?

A. I did not say any such thing.

Q. I am asking you—I want to know if there is anything else?

A. At the top of the bucket there is a yoke which is connected with a kind of chair—it consists of four dogs. Besides there was a piece of iron or clevis in which the rope was fastened.

Q. There were no safety clutches on this skip?

A. There was.

Q. If there was it would not have fallen?

A. No, sir.

(Testimony of R. A. Kinzie.)

Q. Don't you know as a matter of fact that there was none? A. I know there were.

Q. You were a witness on the trial of the Ole Linge case? A. I was.

Q. Did you swear then that there was?

A. I do not remember whether or not I was asked the question.

Q. There were two trials of the Ole Linge case?

A. I believe so.

Q. And you were at the taking of the depositions—did you ever describe any safety clutches?

A. I could not say.

Q. Don't you know that you did not?

A. I do not.

Q. Do you swear that you do not?

A. Yes, sir.

Q. Will you swear that you were not asked the question whether or not there were safety clutches on that skip and if you did not answer that we did not have any on our skips? Were you not asked that question and did you not answer that way?

Mr. COBB.—We object to that. I think the witness is entitled to be shown the paper.

COURT.—If it is in writing.

Mr. JENNINGS.—We did not take his testimony and have him sign it.

COURT.—If it is taken down in shorthand and reduced to writing I think it ought to be shown to him.

Mr. COBB.—Their complaint does not complain that we were negligent in not providing clutches.

(Testimony of R. A. Kinzie.)

They only claim that we had weak rope, a weak bulkhead and weak timbers—there is nothing about clutches.

Mr. JENNINGS.—I do not ask it for that purpose.

COURT.—Why should you go into it then?

Mr. JENNINGS.—I do not wish to expose my purpose.

COURT.—It don't look to me as if it was material. I am inclined to sustain the objection.

Q. Now, Mr. Kinzie, what was done with the ore that was dislodged in the work of sinking the shaft?

A. It was hoisted out.

Q. By whom?

A. The engine and hoist, the engineer.

Q. In whose employ was the engineer?

A. I think at the time—I am not sure whose employ he was in.

Q. Was he not in your employ?

A. I would not be certain. That has been changed and I would not say for sure.

Q. What became of the ore after it came up to the 700-foot level—where did you first hoist it.

A. We hoisted into the bins.

Q. What became of it then?

A. It passed into the bin.

Q. It then passed into your absolute control?

A. From the 700-foot level?

Q. Yes. A. Yes, sir.

Q. Put in your ore-shoot and skip and hoisted on up and passed into your crusher and into your mill?

(Testimony of R. A. Kinzie.)

A. No, I don't care to trip you up on those kind of questions but I cannot answer them that way. You say it goes into the mill but it does not go into the mill.

Q. From there it is hoisted by your company in the operation of your mine and a part of your operation? A. Yes, sir.

Q. Let's make that a little clearer—the ore that was dislodged by the running these machines drills at the bottom of the shaft that was hoisted up to the seven hundred or seven hundred and fifty-foot level?

A. The seven-fifty level.

Q. You had an engine stationed on the six-hundred-foot level? A. Yes, sir.

Q. From there it passed into your ore bin of your company and was by your company hoisted up out of the mine in the operation of your mine?

A. Yes, sir.

Q. The men in the bottom of the mine sinking the shaft had nothing to do with the hoist of the ore from the 750-foot level? A. No, sir.

Q. Had nothing to do with the bulkhead?

A. No, sir.

Q. The skip, cable, or anything else above them?

A. No, sir.

Q. They were just there sinking the shaft?

A. Yes, sir.

That is all.

(Testimony of R. A. Kinzie.)

May 14, 1907.

Court convened pursuant to adjournment and all parties being present as heretofore, the following proceedings were had and testimony taken:

R. A. KINZIE, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Further Direct Examination.

(By Mr. JENNINGS.)

Q. The sheave-wheel that broke on this occasion what does that revolve upon? A. A shafting.

Q. A shaft at the top of the hoist-house?

A. Yes, sir.

Q. About what was the diameter of that sheave-wheel—about what was the radius of that sheave—about what was the distance from the curve of the sheave-wheel to the axis?

A. Approximately three feet.

Q. I will ask you to look at Plaintiff's Exhibit No. 10, a picture of a sheave-wheel, and I will ask you to step up where the jury can see and explain to them what you mean by the perimeter of the sheave-wheel?

A. There are two, the inside perimeter and the outside perimeter.

Q. All right, tell the jury about it.

A. Why, the outside perimeter of the sheave-wheel would be this portion, the flange or the outside. The inside perimeter would be the point where the rope rests which is not shown in the picture but is in here.

(Testimony of R. A. Kinzie.)

Q. This whole business is distinguished from the other part? Explain what the flange of the wheel is?

A. Well, this part from the inside perimeter where the rope rests would be here.

Q. That flange is the two pieces which makes the hollow or curve which the rope rests in?

A. Yes, sir.

Q. Well, all this would be the flange?

A. Yes, sir.

Q. I want to get it straight in the jury's mind about this hoisting from the place where the men sinking as distinguished from the ore hoisted by means of the cable and by means of the skip?

A. The rock broken in the shaft was raised up to the seven-fifty-foot level and put in separate compartments and was raised up there by an engine on the six-hundred-foot level and the big hoist from the top of the shaft—this ore was raised from the bottom to the shoot and dumped into the skip or ore bucket at that level.

Q. The skip that which went to the top of the shaft never went down to the bottom of the shaft where the men were working sinking the shaft deeper? A. No.

Q. The men dug out the ore in making the shaft deeper and put it in some buckets and hoisted it to the 750-foot level by another engine to another compartment? A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. So this big skip, the skip which fell, did not go down to where the men were at all in the hoisting operation? A. No, sir.

Q. These men were sinking the shaft in furtherance of the business of the company and making the shaft deeper to get down to another level?

A. Yes, sir.

Q. How deep was the shaft at that time?

A. I do not remember—between eight and nine hundred feet.

Q. They were sinking for the nine-hundred-foot level? A. Yes, sir.

Q. I will ask you again to get it clear—I asked you who owned the skip, the sheave-wheel, the bulkhead and the cable, and I think you said they were the property of the defendant, the Alaska Treadwell Gold Mining Company? A. Yes, sir.

Q. The Alaska Treadwell Gold Mining Company was operating the skip that fell at that time?

A. Yes, sir.

(By Mr. CHENEY.)

Q. How many men work with a machine drill?

A. Two.

Q. What was they called?

A. A runner and a helper.

Q. Those men engaged down there at that time on these machines they were the only men working there at the bottom of that shaft at the time of the accident—the helper and runner those men were the only men working there? A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. Two men to each machine?

A. Yes, sir.

Q. Do you know anything about some iron rods being in the bottom of the shaft at that time?

A. No.

Q. Did you say there was not any iron rods there?

A. I don't think so—I never heard of any.

Q. Do you know whether or not the runner of the machine sometimes stood on this rod about four feet from the bottom of the shaft?

A. I see what you mean now—you mean the column on which the machine stands.

Q. Is that what you call it?

A. Yes, there is a column there.

Q. The runner can stand on this if he wishes to crank the machine—that is customary?

A. No, that is not customary.

Q. In the bottom of the shaft? A. No.

Q. You never saw these men do that?

A. Not very often.

Q. You never saw them do that?

A. I should say that they do not.

Q. How would the runner crank the machine standing beside the machine—would it not be easier to stand on that column?

A. He would be the distance of the machine away from the crank—it would be about two thirds the distance from the machine to the crank further away.

(Testimony of R. A. Kinzie.)

Q. Who generally cranks the machine—the runner or helper? A. The runner.

Q. The helper, then, does not crank the machine?

A. He is not supposed to.

Q. He does as a matter of fact?

A. He ought not to.

Q. You testified in the Linge case about this shaft being between eight and nine hundred feet?

A. Somewhere there.

Q. It was over eight hundred feet?

A. I should say it was. They were going to the next level—the nine-hundred-foot level.

That is all.

Cross-examination.

(By Mr. COBB.)

Q. On yesterday counsel asked you in regard to this rope that was being used on the 5th day of August, 1903, and I understand you to describe it as a plow-steel cable? A. Yes, sir.

Q. Are you familiar with cables used in this kind of work—the various kinds of cable—various kinds of manufactures? A. Yes, sir.

Q. Is there any better rope made for hoisting—any stronger or better in any way than the rope used on this occasion.

Mr. JENNINGS.—If the Court please I do not think they ought to be allowed to go into the manufacture of cables.

COURT.—Counsel went so far in his examination of Mr. Kinzie that it is pretty hard for the Court to

(Testimony of R. A. Kinzie.)

say just where the bar should be drawn. The objection will be overruled.

A. I know of no better of that size.

Q. Do you know why they are made with a hemp core? A. It makes them more flexible.

Q. Do you know the weight which such a rope is intended to bear?

Mr. JENNINGS.—We object to that as not proper cross-examination.

COURT.—Overruled.

A. Yes, sir.

Q. What is it?

A. A plow-steel cable of that kind—sixty to fifty tons.

Q. What do you mean by that?

A. That would be the breaking strain of that rope.

Q. Do you know how long that rope has been in use?

Mr. JENNINGS.—Objected to as not proper cross-examination.

COURT.—Overruled.

A. A little less than two months?

Q. How long ought a rope of that kind last before becoming worn?

A. From a year to a year and a half probably two years.

Q. In that character of work?

A. That character of work—it would last longer in other kinds of work.

(Testimony of R. A. Kinzie.)

Q. How long did you say it had been in use?

A. Two months.

Q. How do you know?

A. From the record of the rope itself.

Q. Have you that record?

A. I have. (Witness produces paper.) It is the second item.

Q. Which one?

A. This one—one reel 1500 feet 1⅛ inch diameter plow-steel rope.

Mr. COBB.—I wish to have that marked for identification.

Q. I wish you would state to the jury which one of the ropes on that bill was the one that was in use in the shaft at the time of the occasion of this accident?

A. The second rope—one reel 1500 feet 1⅛ inch diameter Q mark it with a cross and a line in it.

Q. Now, Mr. Kinzie, you say you know how long that rope had been in use—now I wish you would explain to the jury how you know that.

A. From the charge stamp on the bill. When it arrives it is sent to the warehouse and when it is taken out to be used the charge is stamped on the face of the bill.

Mr. JENNINGS.—I wish to make a general objection to anything relative to the strength of the rope and anything else along that line except the description of the rope.

COURT.—The Court will overrule the objection with the understanding that if anything is brought

(Testimony of R. A. Kinzie.)

out in the examination of this witness which you consider important you may cross-examine him fully on those matters.

Q. Is that stamped matter on the face of the bill at the bottom here in red—the stamp of the company showing that the rope was put in use?

A. Yes, that is the regular stamp used for that purpose.

Mr. COBB.—We desire to offer it in evidence.

Mr. JENNINGS.—No objection except the general objection.

COURT.—It may be admitted.

(Marked Defendant's Exhibit "A.")

Mr. COBB.—The part we desire to offer is this. "One reel 1500 ft., 1⅛" diam. Plow Steel Rope 52 $780.00," and the stamp here showing that it went out of the warehouse "Charged Jun. 15, 1903, S. B. 66 Folio 317."

Q. Counsel has asked you about the skips and how they were constructed and so on. I hand you here a drawing and ask you what it is.

A. The drawing shows the bucket and frame of what is known as a four-ton skip.

Q. Is that the sort of skip that was in use in the shaft of the Treadwell mine in the month of August, 1903? A. It was.

Mr. COBB.—I ask to have that marked for identification.

Mr. JENNINGS.—Part of that has nothing to do with the skip—there are other drawings on it.

(Testimony of R. A. Kinzie.)

Mr. COBB.—I will offer this in evidence as illustrative of this witnesses testimony.

Mr. JENNINGS.—I submit that this ought to be separated—there are a lot of figures on there.

Mr. COBB.—We don't care anything about them.

COURT.—You don't desire to cut it.

Mr. COBB.—It is only a blue-print. We do not care anything about that. It is a drawing of a car.

(Marked Defendant's Exhibit "B.")

Q. Mr. Kinzie, I wish you would step down here and explain to the jury so that they will understand what that skip was and how it worked.

A. This part of the drawing represents a side view of the bucket and frame and the end view of the safety device—the runner on the skip and the frame.

Q. Mark that with a letter A.

A. On this side is a general—

Q. Mark that with a letter B.

A. This is a general end view of the same thing—this part inside of these lines here show the bucket.

Q. Now, explain that fully to the jury.

A. In this part is shown the side view—represented here on this part of the frame. This drawing shows a view looking in this position and shows the thickness of the metal and the other forging at the tom.

Q. Mark that C.

A. This forging fits on here as shown on this drawing. This hole here carries the shaft pin and the skip rests on this part of the frame. This hole

(Testimony of R. A. Kinzie.)

at the top—there are two—they carry the dogs of the safety clutch. These rivets here are for holding the yoke to which this part is attached. This shows the piece of the top a plain view—here represented by these two safety devices up through this—that is held in place by these two pieces here. Now this outline shows the inside outline—the scale shows the diameter of the bucket. This piece here is made of angle iron and bolted on this portion through these holes which are shown here. This little iron piece here is for to come up and strike the roller and dump automatically. This shows a front view of the collar used for the automatic dumping of the skip. These pieces here together with the chain and spring as shown on here make up the safety device. There are four dogs on each side of the yoke and when there is a load on the skip these pieces are held in. They are pulled in this way. When the load is off they come out like that—there is a spring in here which throws them out. These dogs run in a kind of a guide. This part is simply the yoke. When the strain is taken off the spring presses them out in this position and they are thrown back against the guides.

Q. What was the capacity of that skip?

A. It was known as a four-ton skip.

Q. Was that its approximate carrying capacity?

A. It could carry four tons; yes, sir.

Q. What was the approximate weight of the skip itself?

Mr. JENNINGS.—We object to that as not proper cross-examination.

(Testimony of R. A. Kinzie.)

COURT.—Objection overruled and exception allowed.

A. The skip alone or including the frame?

Q. The whole skip?

A. One and a half, maybe two, tons.

Q. What would be the total weight of the skip and frame and load—the load on the rope?

Mr. JENNINGS.—Objected to that as not proper cross-examination.

COURT.—Overruled.

A. In the ordinary load—

Q. Well, take an ordinary load?

Mr. JENNINGS.—We object to that as incompetent, irrelevant and immaterial—the question is what would be the weight of an ordinary load. It ought to be confined to the particular load.

COURT.—Overruled.

A. The ordinary load would be about five tons on the rope.

Q. What would be the maximum amount of ore that could be placed in that skip?

A. I think four tons could be placed in it.

Q. Any more? A. No.

Q. The maximum load that could be placed on this rope including the skip and frame and the ore which could be placed in it would be less than six ton? A. Yes, sir.

Q. Mr. Jennings on yesterday and again this morning asked you to describe the sheave-wheel that was in use, and you described it as a six-foot sheave-

(Testimony of R. A. Kinzie.)

wheel, and he showed you a picture which is marked Plaintiff's Exhibit No. 10. I will ask you if that is a correct picture of the wheel that was in use on the 5th day of August, 1903, this exhibit No. 10—is that a drawing of the same sheave-wheel or not?

A. It is not a drawing, no.

Q. It is not intended to represent the same wheel? A. No, it is not.

Q. I now hand you a drawing and ask you what it is? A. It is a drawing of the sheave-wheel.

Q. What sheave-wheel?

A. The drawing of a six-foot sheave-wheel.

Q. Do you know what six-foot sheave-wheel that is a drawing of? A. Yes, sir.

Q. What wheel?

A. A drawing of the wheel that was in use at the time of the accident.

Mr. COBB.—I would like to have this marked for identification.

Q. Now, Mr. Kinzie, I will ask you to step down here—

Mr. JENNINGS.—I would like to ask him a question or two first.

Mr. COBB.—If you will offer that part without those figures I will not object to it—if you will offer the picture of the sheave-wheel without the figures.

Mr. COBB.—I do not know just what they represent.

(By Mr. JENNINGS.)

Q. Did you make this plat? A. I did not.

Q. Did you put those figures on there?

(Testimony of R. A. Kinzie.)

A. I did.

Q. How do you know they are correct?

A. By comparing them.

Q. With what?

A. With the wheel in question.

Q. You measured the wheel yourself?

A. Yes, sir.

Q. You made the figures on there?

A. I think there are other figures on there.

Q. Who made the drawing?

A. Mr. Ardell.

Q. How do you know they are correct?

A. Because I compared them afterwards.

Q. You took this drawing here to see that each dimension was correct?

A. No, I did not take that drawing; I took the original.

Q. You did that to get a check on this man Ardell? A. Yes, sir.

Q. Who was he?

A. The surveyor of the mine.

Q. A competent man? A. Yes, sir.

Q. A foreman in the mine? A. Yes, sir.

Q. An engineer in the mine? A. Yes, sir.

Q. Why didn't you trust him to do that?

A. Because I wanted to know about it myself.

Q. Why did you check him up?

A. Because I knew the trial was coming on.

Q. So you took the original drawing and checked him up? A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. He was a witness in the last case?

A. He was.

Q. He testified in the last case?

A. Yes, sir.

Q. You did not testify about that?

A. It was not necessary.

Q. Now, he is dead and you did not have him to come on the stand so you went and measured them so you could come on the stand and testify to them?

A. Yes.

Mr. JENNINGS.—We make the general objection that any measurements of this sheave-wheel are not proper cross-examination. Because we have not gone into the matter at all.

COURT.—Overruled.

Q. (Mr. COBB.) Now, Mr. Kinzie, I will ask you—

Mr. JENNINGS.—Have you offered it in evidence yet?

Mr. COBB.—I will now offer it in evidence.

Mr. JENNINGS.—We object to the introduction of the drawing and especially to that part of the same which shows the figures and measurements on it as not proper cross-examination.

COURT.—The objection may be overruled with the understanding and instruction to the jury that it is not admitted as evidence, but is merely illustrative of the evidence of this witness.

(Marked Defendant's Exhibit *No.* "C.")

Q. I will ask you, Mr. Kinzie, what the first drawing toward you represents?

(Testimony of R. A. Kinzie.)

A. It represents a side view of the sheave-wheel.

Q. A six-foot sheave-wheel?

A. What is known as a six-foot sheave-wheel.

Q. Mark that A. What is represented by the other drawing?

A. The other drawing shows a cross-section of the same sheave-wheel from A to B—two spokes right through the hub.

Q. Now, Mr. Jennings asked you what was meant by the perimeter, and you said the outer perimeter was the outside edge of the wheel and that the other perimeter was the bottom of the groove?

A. Yes, sir.

Q. Now, mark that B. The one showing the cross-section of the wheel and spokes. Now, referring to drawing B. I will ask you what that little round part lying in the groove between the flanges represents? A. That represents the rope.

Q. Is that made in proportion to the wheel?

A. Yes, sir.

Q. Now, Mr. Jennings asked you if you saw this wheel after the accident and you said that you saw it—

Mr. JENNINGS.—I did not ask any such question.

COURT.—The jury will remember what was said.

Q. You say you came down from Berner's Bay on the evening of the 5th about seven o'clock, and you saw that wheel—

(Testimony of R. A. Kinzie.)

Mr. JENNINGS.—I submit that I did not ask him when he saw the wheel—I asked him when he came back.

COURT.—Proceed.

Mr. JENNINGS.—I object to the question assuming that the witness said something which he did not say.

COURT.—Put your question direct to the witness.

Q. Do you remember when you testified in your direct examination as to whether you said you saw that wheel that afternoon or evening—did you testify that you were up to the place where the acident happened? A. In my testimony yesterday?

Q. Yes.

A. I don't remember whether I did or not.

Q. Were you up there that evening?

A. I was.

Q. Did you see the wheel that evening?

Mr. JENNINGS.—Objected to as not proper cross-examination.

COURT.—Overruled.

A. I am not positive in my mind whether I went up there that night or the next morning. I could not swear positively about that.

Q. Did you go up there either that night or the next morning? A. I did.

Q. Did you see the wheel? A. I did.

Q. Examine the break? A. I did.

Q. Examine the grain of the metal?

A. Yes, sir.

Q. Examine it very carefully?

(Testimony of R. A. Kinzie.)

Q. What sort of a wheel was it as to material?

Mr. JENNINGS.—If the Court please, we insist that that is not proper cross-examination.

COURT.—I think the matter was gone into so fully that it is almost impossible for the Court *restrict* the cross-examination. I will overrule the objection with the understanding as I have heretofore stated that you are to be permitted to cross-examine him upon any new matters which are gone into.

Q. What sort of a wheel was it as to material?

A. I considered it a cast steel wheel.

Q. I will ask you, Mr. Kinzie, if there are any better sheave-wheels on the market than a sheave-wheel such as the one in question?

Mr. JENNINGS.—We object to that as not proper cross-examination. Nothing of the kind was asked on direct examination.

COURT.—Overruled.

A. Well, at that time I knew of none better,—no.

Q. Well, I will ask you what you did with reference—what is the custom or habit of mining men to keep up with improvements in mining machinery?

Mr. JENNINGS.—We object to that as not proper cross-examination.

COURT.—I am inclined to sustain the objection.

Q. Counsel on yesterday asked you in regard to this bulkhead which was in the mine at the 750-foot level. I now hand you a drawing and ask you what it represents?

A. It represents a cross-section, a part of the No. 2 shaft at the Treadwell mine, also the stations, ore

(Testimony of R. A. Kinzie.)

A. Very carefully.

bins, the 750-foot level—showing the bulkhead, skip, shoots, and also the timbering.

Q. That shows it accurately?

A. Yes, sir; of course, the tunnel is not shown there.

Mr. COBB.—I ask to have this marked for identification.

Q. I will ask you what the upper part of the drawing represents?

Mr. JENNINGS.—We object to his asking questions about it until he offers it in evidence.

COURT.—Show it to counsel.

Mr. COBB.—We offer it in evidence.

(By Mr. JENNINGS.)

Q. Who made this?

A. The drawing itself?

Q. Yes. A. Mr. Ardell.

Q. When?

A. I should say something over two and a half or three years ago.

Q. Something like two or three years ago?

A. The first trial of the case?

Q. Did he make it from actual measurements?

A. Part of it; yes, sir.

Q. What was the other made from?

A. Part of it made from sketches, and part made from the drawings and records of the company.

Mr. JENNINGS.—We will not object to it.

COURT.—Let it be marked as an exhibit merely illustrative of the witness' testimony.

(Testimony of R. A. Kinzie.)

Mr. JENNINGS.—I understand that he is merely making the witness his own and that I may cross-examine him later on it.

COURT.—The Court has said so, and suggested it to you.

(Marked Defendant's Exhibit "D.")

Q. Now, Mr. Kinzie, if you will step down here. Now, referring to Defendant's Exhibit "D," which shows a cross-section in the middle of the drawing—I will ask you what that represents?

A. It represents a cross-section of the shaft—part of the stations, ore bin and skip station.

Q. Mark that drawing A. What is this here marked bulkhead with an arrow pointing toward it?

A. It shows a cross-section of the bulkhead at that station, also the manner in which it was installed.

Q. What was the purpose of putting it at an angle?

A. To deflect any falling body coming down the shaft into the station and prevent it going any further down the shaft.

Q. What is the space marked here—ore bin?

A. That is a bin for holding the rock which is dumped in there from the tramway and fell down in here to be loaded into the skip.

Q. What is this object at the lower part marked platform?

A. That is a platform—a wooden platform put in across the shaft at the point to catch any falling bodies that might fall down the shaft.

(Testimony of R. A. Kinzie.)

Q. What was that bulkhead built of?

A. Twelve by twelve timbers.

Q. Twelve inches square? A. Yes, sir.

Q. The next drawing, mark that B, and explain to the jury what it is.

A. That is a longitudinal section or what would be a front view of the shaft shown in drawing A.

Q. That represents it looking down?

A. No, it is looking at it sideways—this section of the shaft. This line here represents part of the timbers. This line here represents the upper part of the station shown in the cross-section. This represents a front view of the bulkhead, as seen if standing inside looking from the station toward the shaft. This line here represents the timbering in the shaft. This line coming on both sides of the shaft on this side represents the width of the ore bin at this station. This part of the drawing represents the skip-shoot station. This being the side of the station coming in here taking ore the full width of the shaft. This drawing here represents the timber as shown in the cross-section here, and this part here shows to the left of the shoot as shown in the cross-section. This part here shows the platform and station—the cross-section showing another view looking at it from along the timber—the longitudinal way of the shaft. The lower part represents the bottom of the shaft.

Q. How long had that bulkhead been in use there—that system of bulkhead?

A. That system had been used—well, that particular method of building them had been always used.

(Testimony of R. A. Kinzie.)

I could not say exactly how long that method had been used. I should say a year, maybe less. From the time when the sinking of the shaft started. I think that was put in at the time the sinking was started in No. 2 shaft.

Q. It had been in use ever since the sinking of that shaft?

A. From the time the shaft started from the six-hundred foot level.

Q. Something like a year? A. Yes, sir.

Q. From what time?

A. From the time of the starting of the Bartello contract—the time of sinking the shaft from the four hundred and forty-six-hundred-foot levels.

Q. I do not care anything about the date.

A. About a year, and perhaps a year and a half.

Q. That was the beginning of that shaft?

A. Yes, sir.

Q. Up to that time it had always been found safe and sufficient.

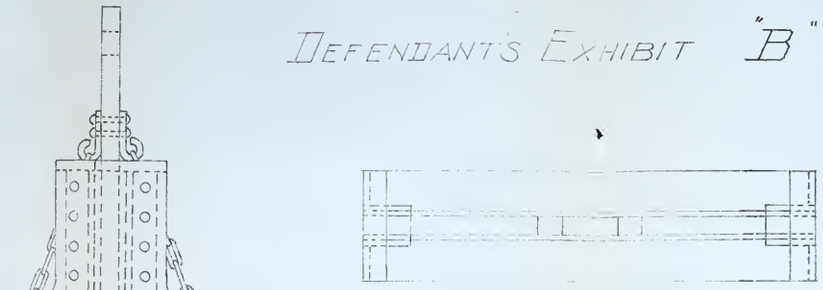
Mr. JENNINGS.—We object to that as leading and not proper cross-examination.

COURT.—Overruled.

Q. Had there been any accident prior to that time? A. No, sir.

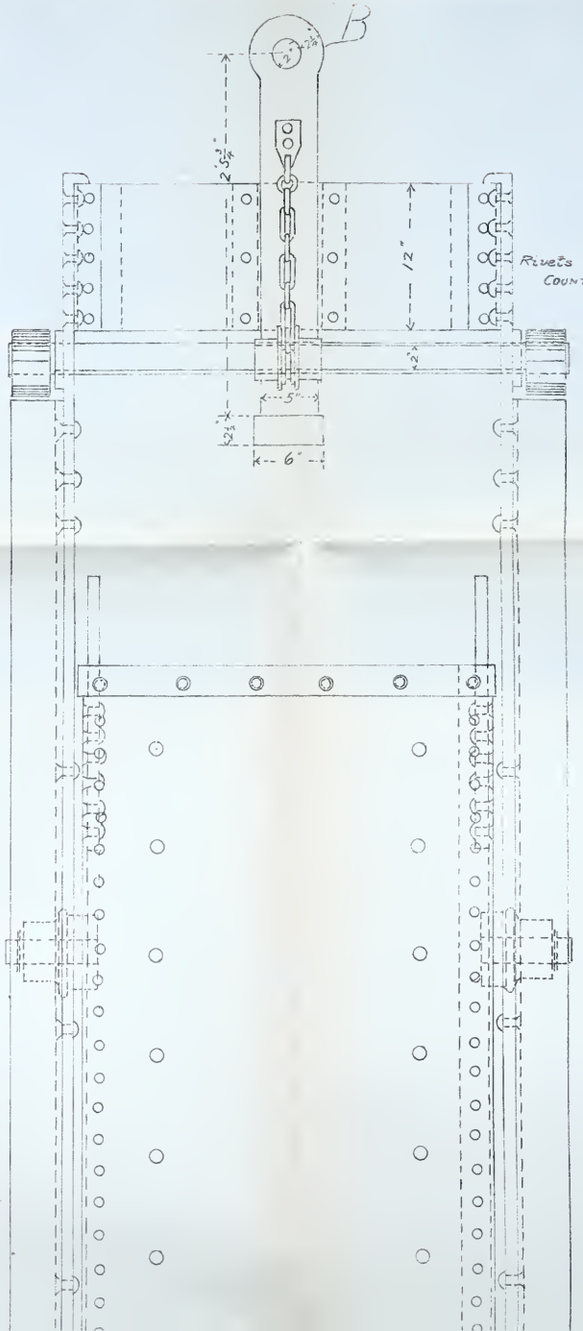
Said Exhibits "B," "C," and "D" are as follows:

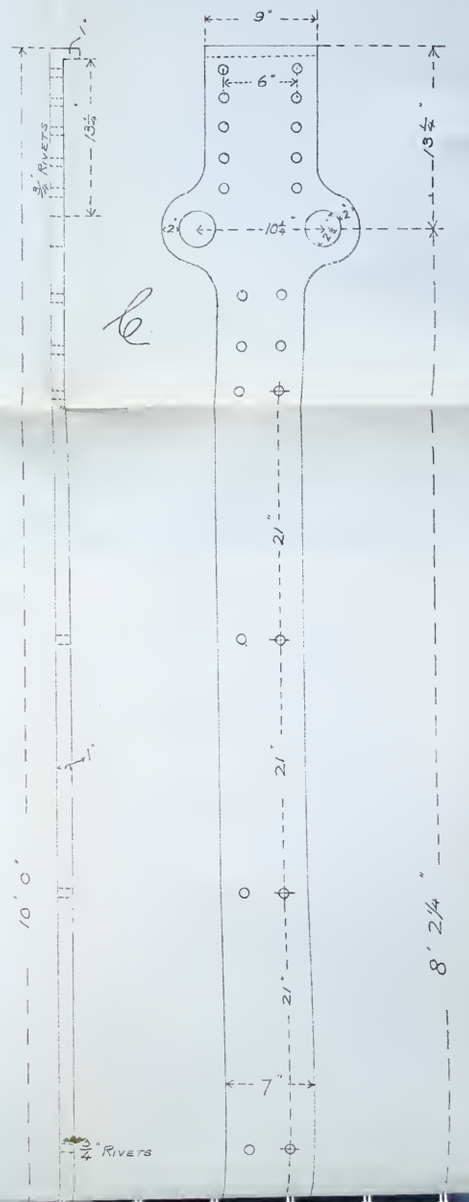
DEFENDANT'S EXHIBIT "B"



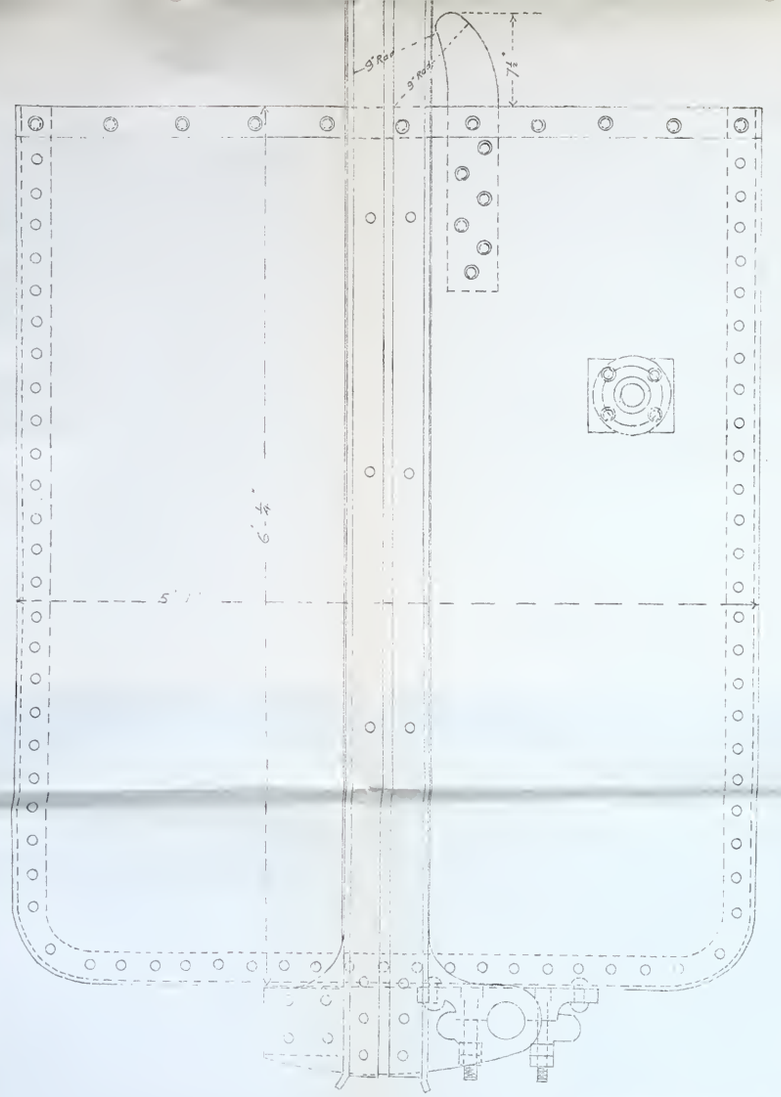
Filed May 14 1907
~~Diff~~ Exhibit No. B
Cause No. 460a
C.E.P.
Clerk

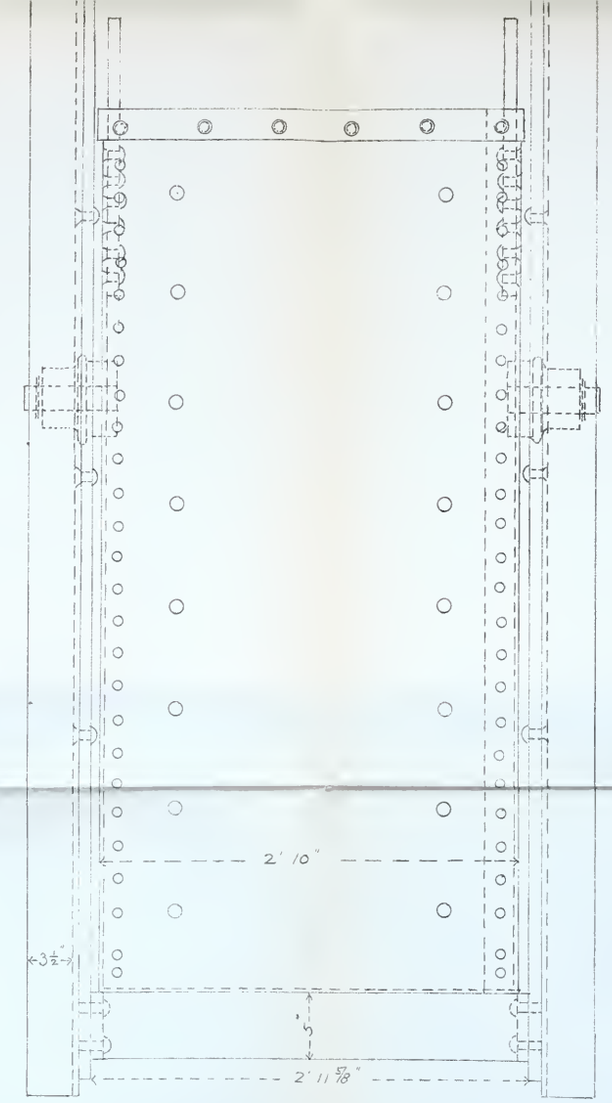
4 TON
SKIPS

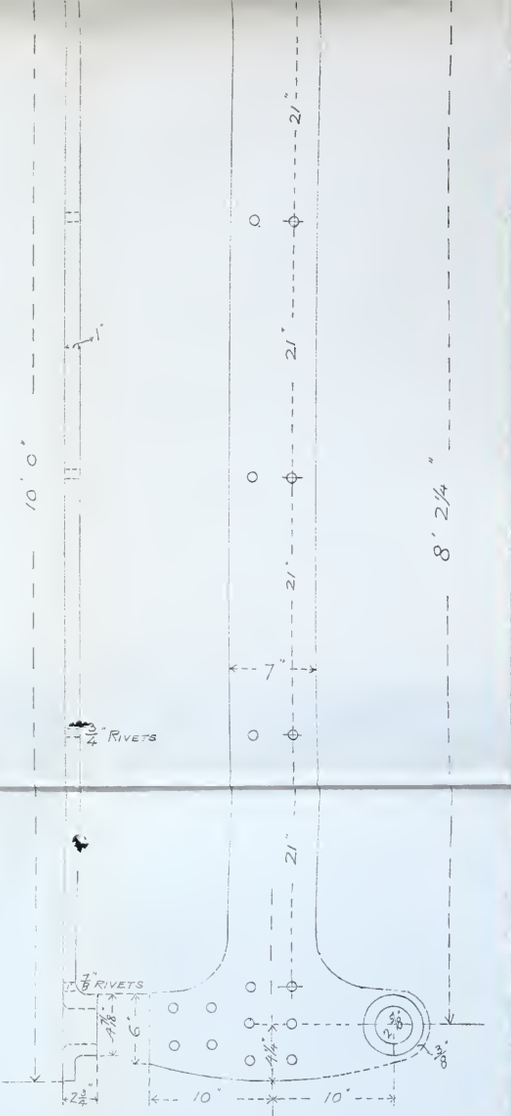




4 TON SKIPS

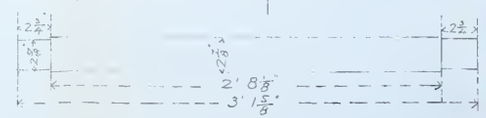






4 TON CAPACITY SKIP
- BUILT BY
ALASKA TREADWELL GOLDM. CO
DOUGLAS ISLAND, ALASKA.

BOTTOM BRACE

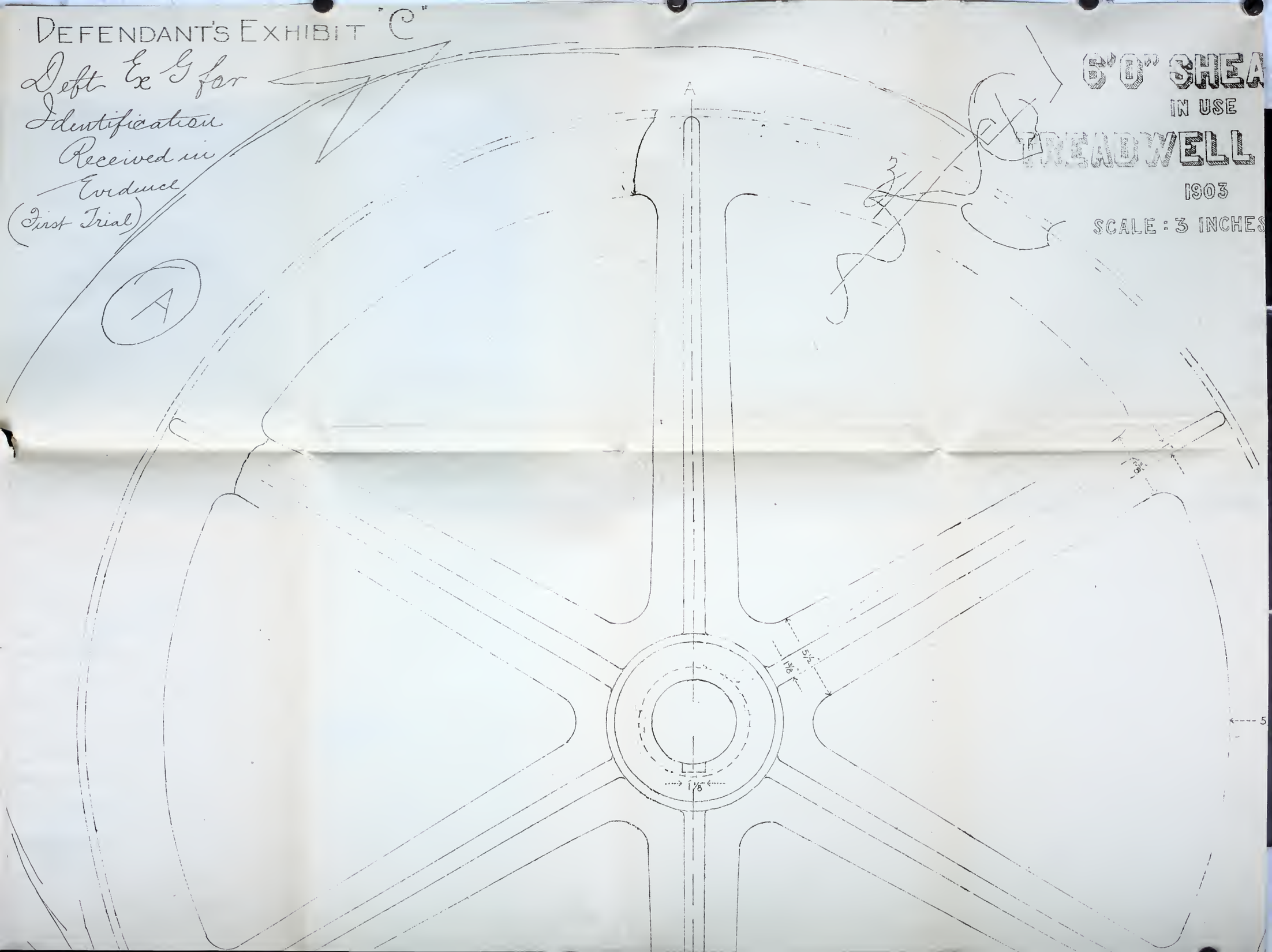


SHAFT ENDS RIVETED

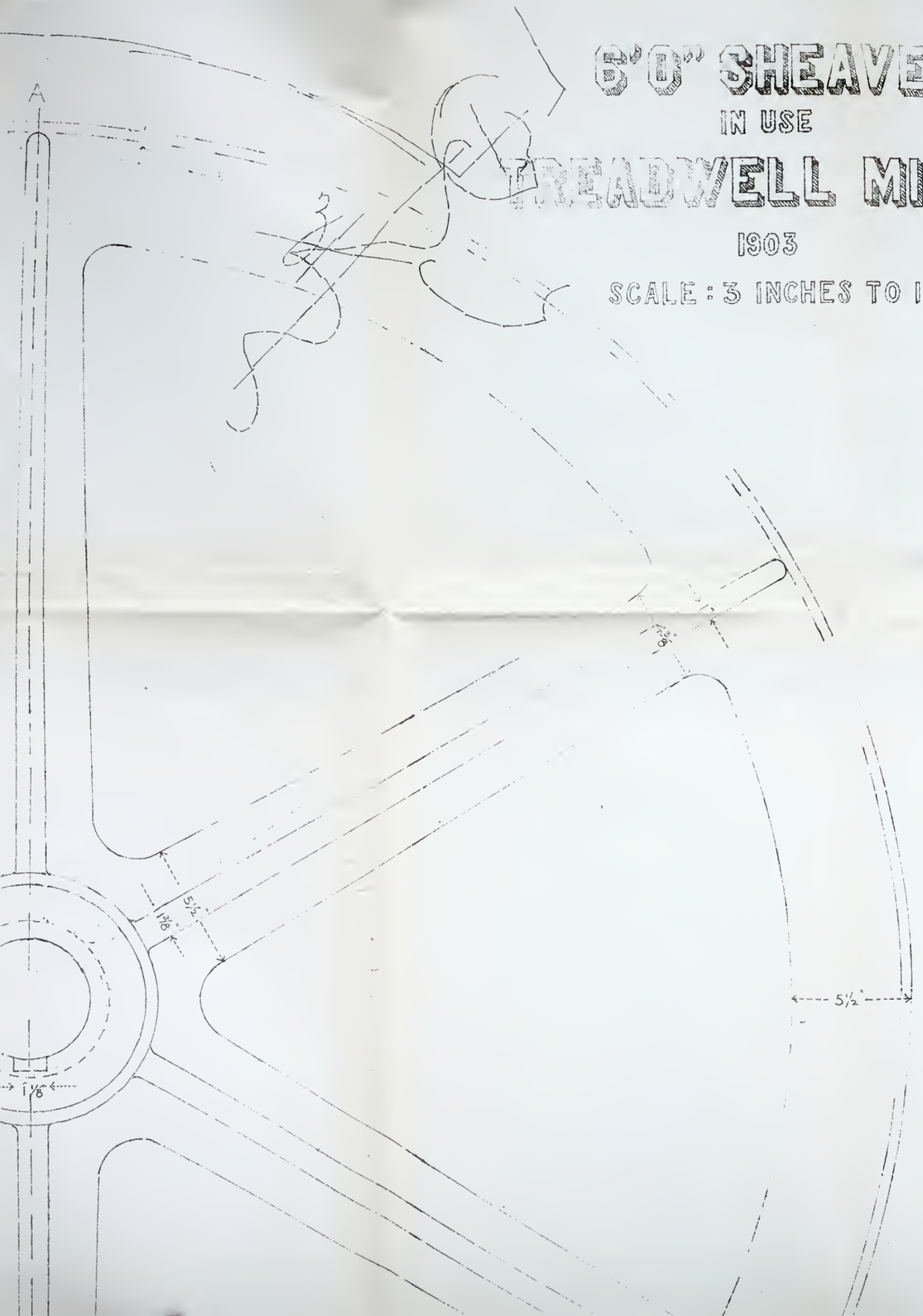
DEFENDANT'S EXHIBIT "C"

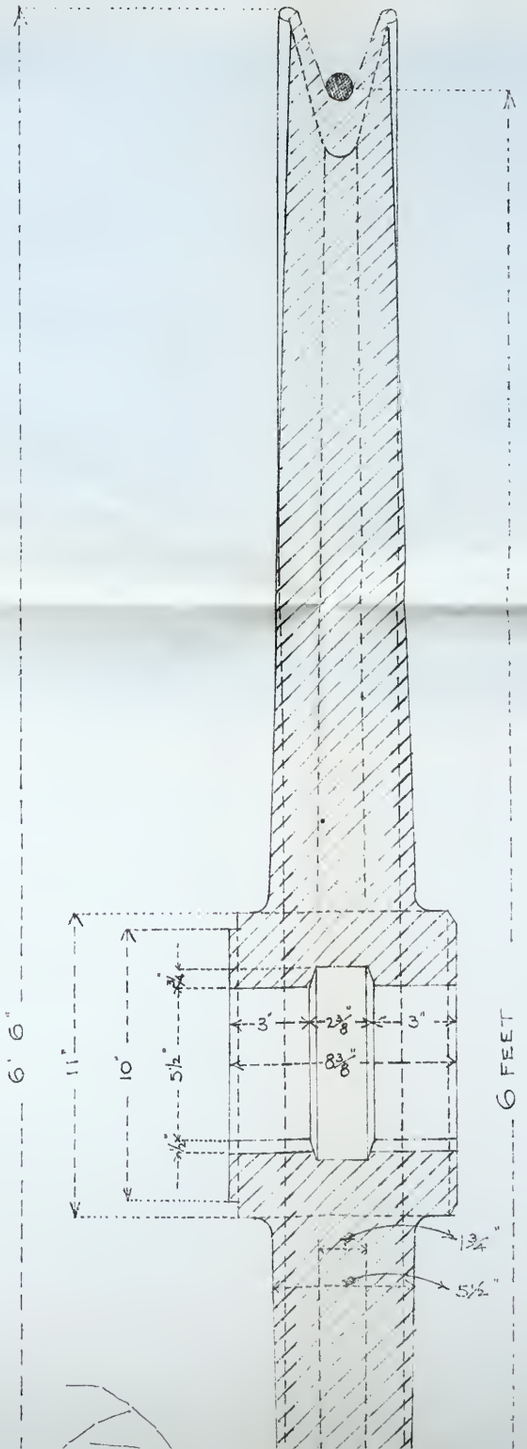
Deft Ex G for Identification Received in Evidence (First Trial)

(A)

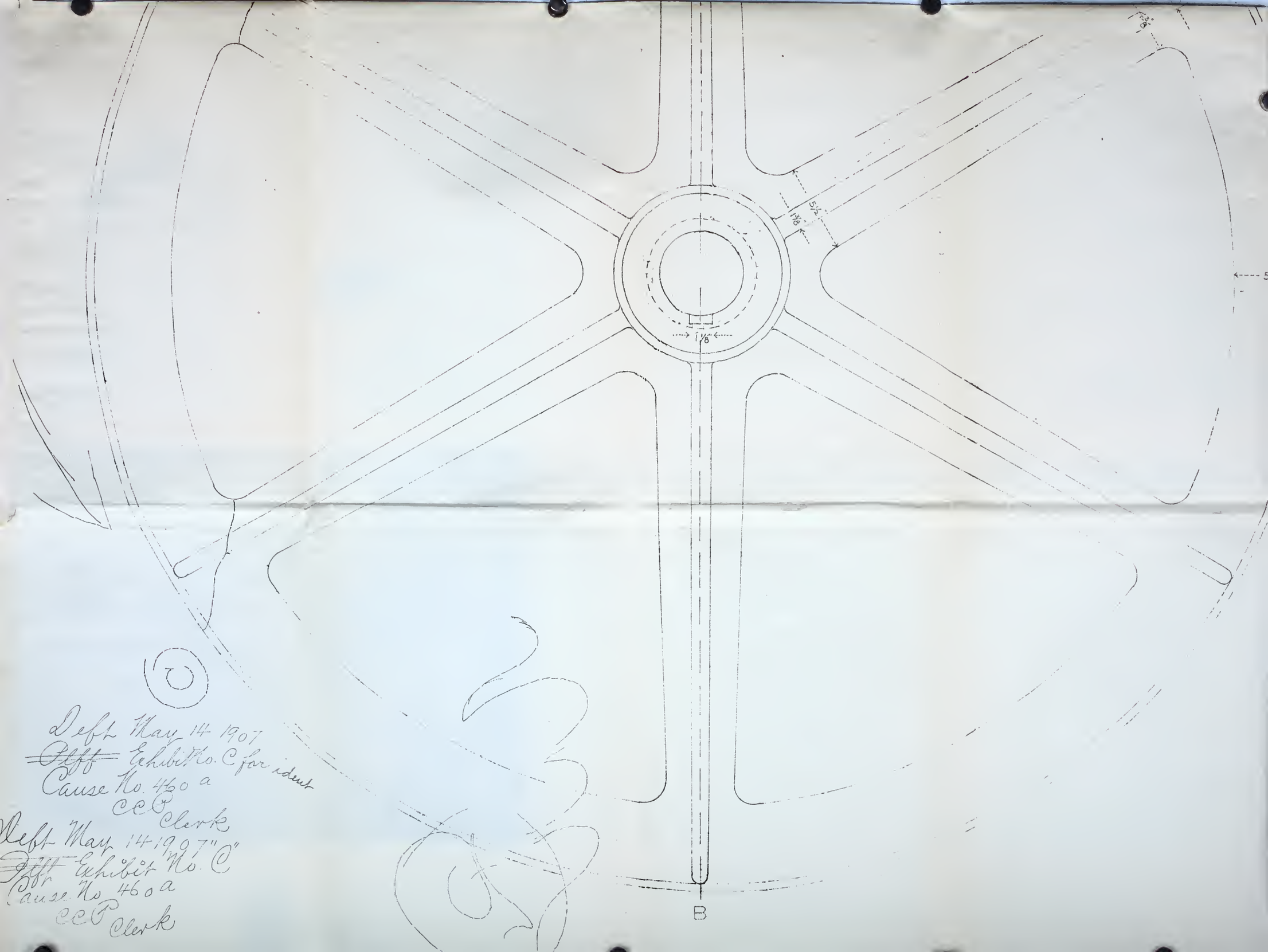


6'0" SHEAVE
IN USE
ATHEADWELL MINE.
1903
SCALE: 3 INCHES TO 1 FOOT.



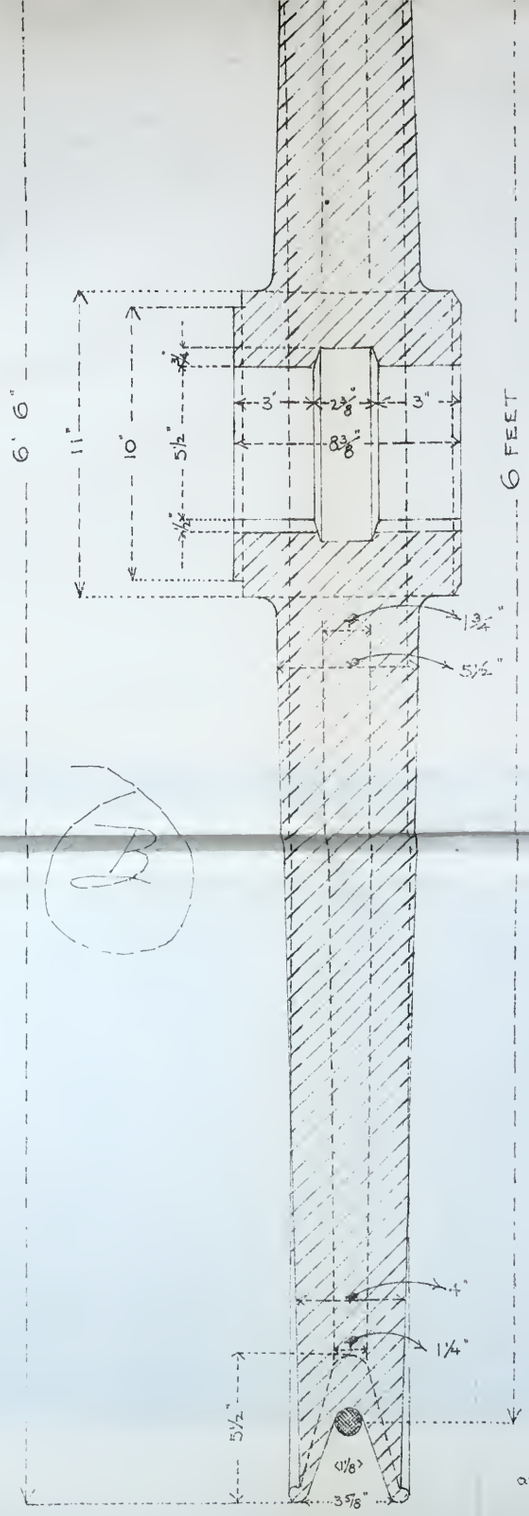


6' 6"
6"
6"
3"
1⅛
9/16
3 9/16

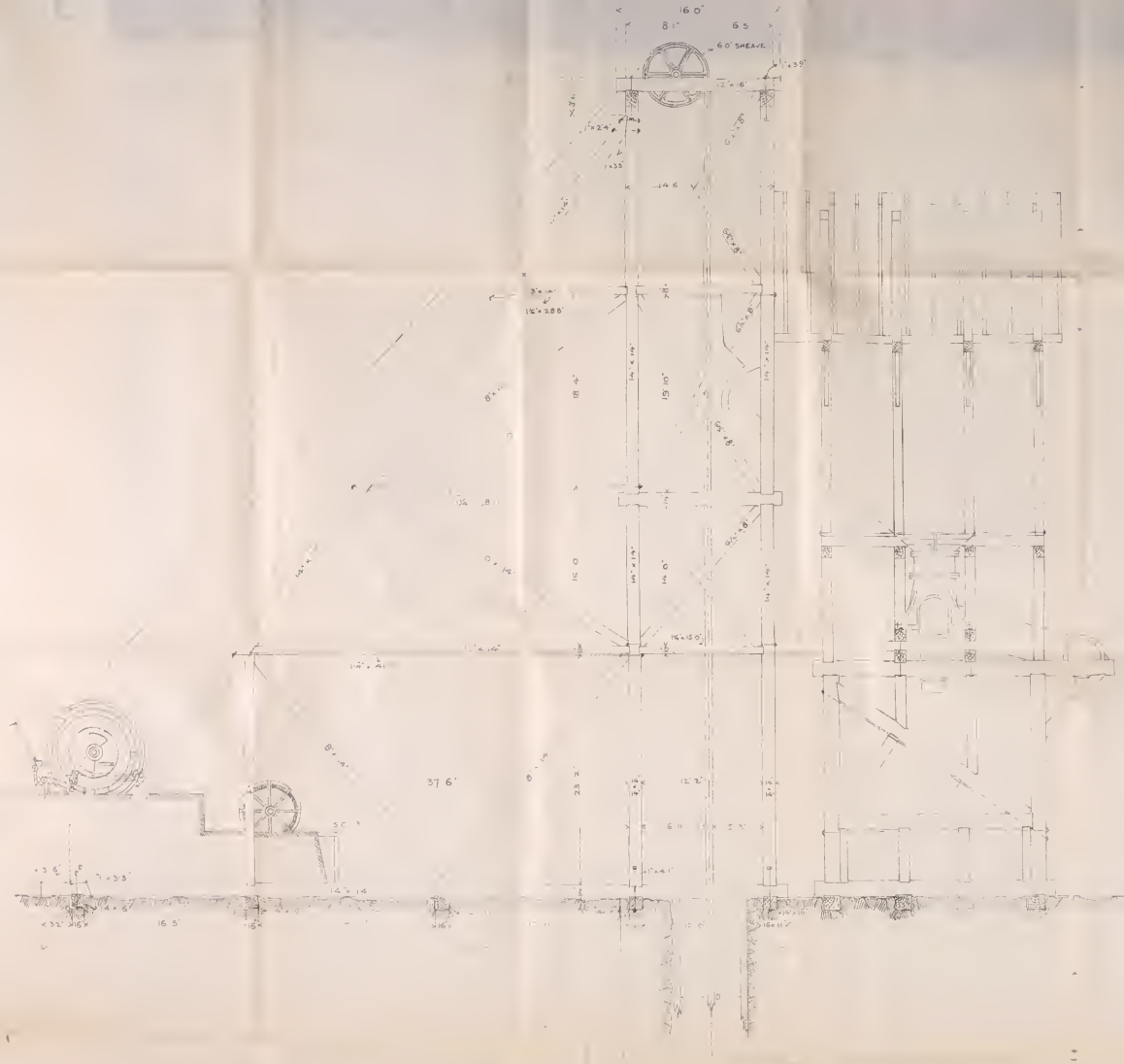


Defts May 14 1907
~~Pltff~~ Exhibit No. C for ident
Cause No. 460 a
C C C Clerk

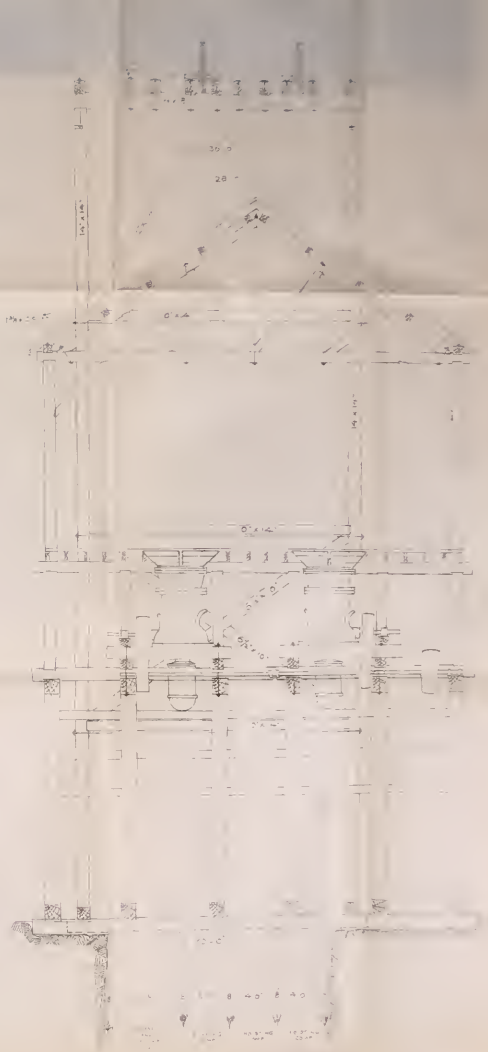
Defts May 14 1907 "C"
~~Pltff~~ Exhibit No. C
For
Cause No. 460 a
C C C Clerk



SECTION THROUCH A-B



CROSS SECTIONS



LONGITUDINAL SECTIONS

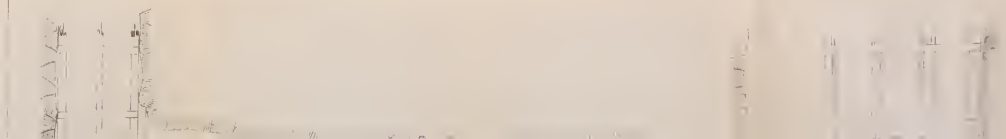


Exhibit I

MAP

SHOWING

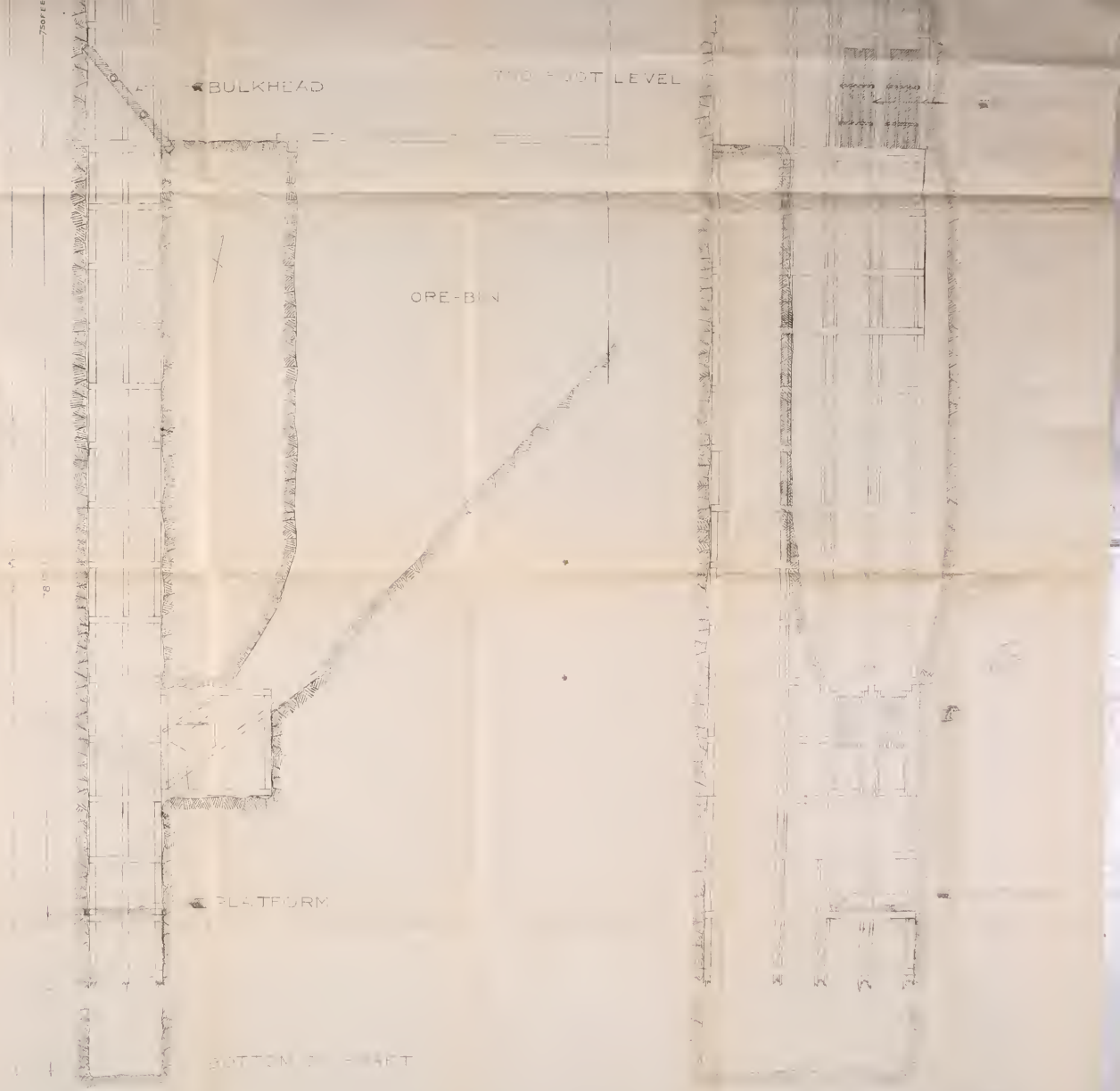
CROSS SECTIONS AND LONGITUDINAL SECTIONS

OF

HEADFRAME AND No 2 SHAFT

TREADWELL MINE.

SCALE: 1 INCH TO 5 FEET.



(Testimony of R. A. Kinzie.)

Redirect Examination.

(By Mr. JENNINGS.)

Q. That was a good rope?

A. An excellent rope.

Q. Best known on the market and practically new? A. Yes, sir.

Q. A nineteen wire six-strand hemp core rope?

A. Yes, sir.

Q. The best rope that could possibly be bought?

A. Yes, sir.

Q. Plow steel? A. Yes, sir.

Q. Had been in use only two or three months?

A. Not that long.

Q. From May until August—how long is that?

A. No, the rope is charged out of the warehouse on June 15th. That is the time it left the warehouse. It might not have been put in for a few days afterwards, and it might have been a number of days, I don't know.

Q. The date of the bill is May 23d; how long after that was the rope charged out of the warehouse?

A. You mean the date of the bill?

Q. How long after the date on that bill did you start to use that rope?

A. Some time after the 15th of June.

Q. Are you acquainted with Fraser & Chalmers?

A. I know of them.

Q. They make sheave-wheels, too, don't they?

A. Yes.

Q. The sheave-wheel which you exhibited to the jury did not have these on here?

(Testimony of R. A. Kinzie.)

A. How is that?

Q. Is there not something along here connecting the shaft with the sheave-wheel? A. Yes, sir.

Q. There are part of the things which connect the wheel with the shaft?

A. No, it is not part of the sheave-wheel.

Q. Do you mean to say that this is not a correct representation of that wheel and shaft bearing?

A. Which wheel?

Q. The wheel which was in use and which caused the accident.

A. I can't say whether it was or not. I don't know.

Q. This is a six-foot sheave-wheel?

A. That is a sheave-wheel with the shaft and boxes.

Q. Were there any boxes on that sheave-wheel?

A. No.

Q. No bearing connecting the sheave-wheel with the shaft?

A. These boxes have nothing to do with the sheave-wheel.

Q. What was they on? A. On the shaft.

Q. If you were told that that was a photograph of the sheave-wheel what would you say?

A. I don't know what the size of it is—you can't tell anything about that picture.

Q. It is very much like it? A. Yes.

Q. There are six spokes there?

A. Yes, six spoke wheel.

(Testimony of R. A. Kinzie.)

Q. The only difference you can see in the general appearance of Plaintiff's Exhibit No. 10 and the wheel which you introduced here in evidence as exhibit "C" is that part which is not there?

A. That is not part of the wheel.

Q. I am not talking about the boxes?

A. No, it is not.

Q. What other difference do you see?

A. That could be a two-foot wheel or a fifty-foot wheel, for all I know.

Q. Is that the only thing?

A. The dimensions are on that wheel.

Q. How do you know that is not a drawing of a wheel exactly like the one that was in use over there at that time?

A. This is not a drawing at all.

Q. Well, a photograph, then; how do you know that? A. I don't know.

Q. Do you know that it is not?

A. I don't know. I could not tell where that picture came from. I would not trust you with anything.

Q. You know my opinion of you?

A. I can say the same for you, sir.

Q. You say you went up there the next night or the next morning to look at this wheel?

A. I did.

Q. You were a witness in the trial of Ole Linge?

A. I was.

Q. There were two trials? A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. Did you ever swear before that you went up there to look at it?

A. I could not say—but I think I did.

Q. Don't you know that you did not?

A. I do not.

Q. Do you swear that you did?

A. I do not.

Q. Have you not just made that up?

A. No, sir.

Q. Have you not talked with Mr. Cobb about that being a necessary part of your case?

A. No, sir; Mr. Cobb said nothing about it.

Q. You did not get back until late that night?

A. About seven o'clock.

Q. Mr. Kinzie, you said you considered that a cast-steel wheel? A. Yes, sir.

Q. You looked it over very carefully and considered it a cast-steel wheel? A. Yes, sir.

Q. That is the best that you can say is that you considered it a cast-steel wheel?

A. That is the best I can say.

Q. Would you swear positively that it was a cast-steel wheel? A. No, sir, I would not.

Q. If Fraser & Chalmers said they had never sold to the Treadwell Company a cast-steel sheave-wheel, would that shake your opinion any?

A. No, sir.

Q. That would not shake your opinion?

A. No, sir.

Q. If the man who patched that wheel says that it was made of cast iron would that shake your opinion?

(Testimony of R. A. Kinzie.)

Mr. COBB.—I do not think he has a right to take his own witness and ask him a hypothetical question of that kind.

COURT.—Objection overruled.

Q. If the man that patched that wheel should say that it was a cast-iron wheel would that shake your opinion any? A. No, sir.

Q. Who did patch it? A. I don't know.

Q. Will that change your opinion in any way?

A. No, sir; that would not change my opinion in any way.

Q. Look at this telegram.

A. I have seen that before.

Q. Look at it again.

A. I know where they came from. Yes, I have seen them before.

Q. Did you or your management ever calculate the breaking strength of that bulkhead?

A. Calculation—I never made it.

Q. Never calculated it? A. No, sir.

Q. Did you ever calculate the falling impact of ten thousand pounds?

A. I have made calculations like that.

Q. What did you make it out to be?

A. I did not keep the figures.

Q. You know it was a great deal more than the breaking strength of that bulkhead?

A. The facts prove that.

Q. You know it now? A. I know it; yes.

Q. You never made any calculation of it before?

(Testimony of R. A. Kinzie.)

A. Personally I did not.

Q. Did any of your management?

A. The engineer should have, and I think they did.

Q. I agree with you in that. You say the system of bulkheads used there had been in use before for a year and a half and you had never had an accident during that whole year and a half? A. No.

Q. Did you ever see such a bulkhead as that built before? A. I have.

Q. Did you consider it a safe bulkhead?

A. I did.

Q. For a falling skip? A. Yes, sir.

Q. What kind of bulkheads have you seen besides that kind?

Mr. COBB.—We object to that—

COURT.—Objection sustained.

Q. Did you ever hear of a V-shaped bulkhead?

A. Yes, sir.

Q. Did you ever hear of a solid pillar bulkhead?

A. You mean leave a solid pillar of rock?

Q. Yes, a solid pillar of earth or rock?

A. A solid pillar is very good.

Q. You have heard of a V-shaped bulkhead?

A. Yes, sir.

Q. This method had been in use for a year and a half? A. Yes, sir.

Q. You have a different kind of bulkhead in there now?

Mr. COBB.—We object to that; that has nothing to do with this case.

(Testimony of R. A. Kinzie.)

COURT.—Objection sustained.

(By Mr. CHENEY.)

Q. You say you were using four-ton skips over there at that time? A. Yes, sir.

Q. This plan which you introduced was a plan of a four-ton skip? A. Yes, sir.

Q. Was that skip made by any manufacturing concern? A. No, sir.

Q. Were they made there in your own machine-shop? A. Yes, sir.

Q. They were not made for sale?

A. No, they were made for our use.

Q. Just made for your own use?

A. Yes, sir.

Q. When did you commence using this four-ton skip?

A. I have forgotten the exact time when it was.

Q. Approximately.

A. I should say about a year, maybe two years, after I got there.

Q. How long before this accident?

A. I should say a year and a half or two years.

Q. Now, when this skip was made they were made twice as big as they were before?

Mr. COBB.—We object to that as incompetent.

COURT.—Sustained.

Q. Those you used before were two-ton skips?

A. They were not.

Q. Do you know who installed the plant of the Treadwell shaft? A. Yes, sir.

(Testimony of R. A. Kinzie.)

Q. You did not install it? A. I did not.

Q. You do not know the size of skips which were installed in 1898? A. I do.

Q. You did not know at the time of the last trial?

A. I was not sure.

Q. Were they not using what was called two-ton skips?

Mr. COBB.—Same objection.

COURT.—Sustained.

Q. You say you have seen bulkhead like this one here before these three little timbers used in other mines? A. Yes, sir.

Q. Is it not a fact that in those mines they had a good bulkhead besides for the protection of the men?

A. No, sir; that was a good bulkhead.

Q. You say you have seen a solid pillar bulkhead?

A. Yes, they are very good.

Q. They are safe? A. Yes.

Q. A V-shaped bulkhead is a good bulkhead?

A. A very good bulkhead.

Q. I think you can see from there perhaps—what does this line here represent?

A. In that case it represents the back of the ore bin—the east side in that case of the ore bin.

Q. What is this here—these two lines in the center of the shaft—would that be one of the guides?

A. That is the guide.

Q. They never used that kind of a bulkhead there before? A. No, sir.

(Testimony of R. A. Kinzie.)

Q. That was more or less of an experiment on the part of the management of the Treadwell company putting in that kind of a bulkhead?

A. Not at all.

Q. They were in use for only a short time before this accident?

A. Used since the shaft started.

Q. It has not been found to be satisfactory?

A. No.

Q. Been abandoned as a poor and improper bulkhead?

Mr. COBB.—Objected to as immaterial.

COURT.—Sustained.

That is all.

C. B. MORGAN, being duly sworn, produced a book entitled "Mutual Reserve Life Insurance Co., 1907," and identified it as having been furnished to him by said company for use in his business as life insurance agent and solicitor. The American Experience Table of Mortality on pages 18 and 19 of said book were then introduced. This table gave the life expectancies for all ages between 20 and 30.

The deposition of F. J. Taylor was then read; said deposition was as follows:

[Deposition of F. J. Taylor.]

F. J. TAYLOR, being duly sworn:

(By Mr. JENNINGS.)

Q. Please state your name.

A. F. J. Taylor.

Q. Where do you reside?

(Deposition of F. J. Taylor.)

A. Juneau, at present.

Q. What is your occupation or trade?

A. Carpenter.

Q. How long have you been engaged in the carpenter business, trade or occupation?

A. Ten years.

Q. What kind of carpenter work have you been accustomed to do? A. Nearly all kinds.

Q. State what the term "nearly all kinds" includes—be a little more definite.

A. Including house carpenter work, bridge work, mining work and so on.

Q. When you say "mining work," what particular branch of mining work comes in the carpenter business?

A. Such as building mills, timbering mines, and other things of that kind.

Q. What was your occupation on or about the 5th day of August, in the year 1903?

A. Carpenter, at Treadwell.

Q. In whose employ were you then?

A. Employ of the Treadwell Gold Mining Company.

Q. The defendant in this case?

A. Yes, sir.

Q. The Alaska Treadwell Gold Mining Company? A. Yes, sir.

Q. In what capacity were you at that time employed by them?

A. As carpenter on the repair gang.

(Deposition of F. J. Taylor.)

Q. Who was your immediate superior officer—who was the foreman of the carpenter gang or shop?

A. Mr. Carpenter.

Q. Man by the name of Carpenter? State whether or not you recall an accident that occurred at the Treadwell mine of the defendant company, the Alaska Treadwell Gold Mining Company, at their mine on Douglass Island called the "Treadwell"—do you recall it?

A. Well, there was several accidents there.

Q. I say on the 5th day of August, 1903?

A. Yes, sir; I recall it.

Q. The accident to which I refer is the one caused by the falling of a "skip" down on some men who were sinking a shaft in the Treadwell mine—do you recall that occcurrence? A. Yes, sir.

Q. You may state, if you know, how many compartments there were in the shaft of that mine?

A. I believe there were four.

Q. Do you know what they were—what they were used for or called? A. Yes, sir.

Q. What?

A. Well, there was two compartments that landed ore, one for the man-cage, and the other was used for the pump and steam-pipes.

Q. Do you know the dimensions of each of those compartments?

A. Three of them were about four by six feet inside, and the other was a little smaller.

Q. Now, state whether or not shortly after the accident—I will withdraw that. Are you and were

(Deposition of F. J. Taylor.)

you familiar with the method of hoisting ore over there, that was in vogue at the time of this accident I have referred to? A. Yes, sir.

Q. Just describe generally, Mr. Taylor, how it was done.

A. Well, the ore was hoisted by a steam engine or hoist, and a large-sized bucket—

Q. Well, a steam hoist, engine—and what else besides a hoisting engine? Just go ahead and explain in your own language about how things were operated there in that shaft in the hoisting of ore, whether there were any cables, or shive-wheels, drums, engines, skips or anything of that kind—go ahead and tell generally how it was done.

A. Well, the ore was hoisted in a large bucket, by means of a cable running over a shive-wheel at the top of the shaft, and running down on top of the drum of the hoisting engine.

Q. Well, was this bucket you refer to known by any other name—what is it usually called?

A. They are sometimes called skips.

Q. Do you know anything about the size of those skips in use at that time?

A. Not the exact size; no.

Q. Well, approximately?

A. I should say they were about two and a half feet, by about four feet, by about six feet.

Q. Six feet in which dimension?

A. In depth.

Q. Now, you spoke of a shive-wheel; where was that situated?

(Deposition of F. J. Taylor.)

A. Above the hoist—right above the shaft-opening of the shaft?

Q. How far above the opening of the shaft?

A. I should say about sixty feet.

Q. Now, where was the drum and engine situated that you spoke of?

A. Well, it was situated, I should say, about fifty or sixty feet from the mouth of the shaft.

Q. On a level with the mouth of the shaft?

A. No, sir; elevated about seven or eight, I should say.

Q. And about what was the angle from the shive-wheel to the drum?

A. I should say it would be about forty-five degrees.

Q. This cable you spoke of, after having been attached to the skip, what became of it?

A. It run up over the shive-wheel at the top of the hoist, and from there to the drum.

Q. Do you know about what was the length of that drum?

A. I think it was about six feet.

Q. And about what was the diameter of the drum, if you know?

A. I believe it was six or seven feet.

Q. Well, now, state whether or not on the morning of the accident I have spoken of you had occasion to perform any service with reference to the shive-wheel that was situated above the compartment in which the accident occurred?

(Deposition of F. J. Taylor.)

A. Yes, sir; I had to go up and help take the shive-wheel down.

Q. And who directed you to do that?

A. Mr. Carpenter.

Q. This same gentleman you have before spoken of? A. Yes, sir.

Q. Who assisted you in taking that shive-wheel down?

A. I couldn't say—there was a couple of carpenters; I don't remember their names.

Q. State whether or not Mr. Carpenter was there any part of the time.

A. Yes, sir, he was there a part of the time.

Q. State what you did with the shive-wheel when you took it down.

A. It was taken outside, and I crated it up.

Counsel for the defendant moves to strike the last part of the answer as not responsive to the question.

Overruled.

Q. What did you do with it after you had crated it?

A. I left it there some time, and then it was put on the train and taken away.

Q. Did you see it put on the train?

A. Yes, sir, I helped put it on the train.

Q. And you saw it moved away?

A. Yes, sir.

Q. Now, state whether or not, from the time you took the shive-wheel down and the time you saw it moved away on the train, state whether or not during

(Deposition of F. J. Taylor.)

that time any person struck it with a hammer or knocked off a piece of it in any way?

A. Well, I couldn't say to that, for it was out of my sight after I crated it up before it was sent away.

Q. Well, to make the question a little more definite: From the time you took that shive-wheel down to the surface of the earth up to the time you had crated it, state whether or not any person knocked off a piece of it. A. No, sir.

Q. Or mutilated it, or changed its form in any way? A. No, sir.

Counsel for the defendant objects to the question as leading.

Overruled.

Q. State how you know that no person did such a thing as that.

A. In the first place it was in my sight constantly; and in the second place, it couldn't have been broken without my knowing the change in the shive-wheel.

Q. Now, I wish you would describe, Mr. Taylor, as near as you can, the appearance of that shive-wheel when you took it down, when you were sent to take it down—describe the appearance as near as you can.

A. Well, it was a six-foot wheel, I should say; and there was between three and five feet of the perimeter broken out of it.

Q. When you say the "perimeter," what do you mean?

(Deposition of F. J. Taylor.)

A. The rim, the outside part of the wheel.

Q. About what time of day was it, Mr. Taylor, when you took this wheel down?

A. I started at it just about seven o'clock in the morning.

Q. Do you know what time the accident occured?

A. Well, it was sometime that morning.

Q. Before, or after, you took the wheel down?

A. Before I took the wheel down.

Q. Now, when you took it down, state what, if anything, you noticed about the wheel, at either end of the break?

A. Yes, sir; there was some rivet holes at one end of the break.

Q. Were these rivet holes—about how far were these rivet holes from the end of the break?

A. Two of them close to the end, and I think the third one, it was broken right through the center of the hole.

Q. Now, Mr. Taylor, had you ever seen that particular wheel that you took down—ever see that before that time? A. Yes, sir.

Q. When did you see that before?

A. When I put it up, some two or three weeks before that.

Q. How did you come to put it up?

A. Well, I got orders from the foreman to do so.

Q. What was its condition when you put it up?

A. Well, there had been a piece broken out of the flange of the wheel, and the piece had been set back in and a patch riveted on the outside of the flange.

(Deposition of F. J. Taylor.)

Q. About how long was the piece that had been broken out?

A. About twelve or fourteen inches long.

Q. And about how deep was it if you recall?

A. Well, between two and three inches.

Q. State how far the break—state how far that break extended with reference to the top and bottom of the cable that was lying in the groove?

A. I should say it was about halfway down the cable.

Q. Now, you say that break had been repaired. Describe the patch that had been placed over it as near as you can.

A. It was a patch about four inches wide, probably eighteen or twenty inches long, and had been just riveted on the outside with seven or eight rivets.

Q. State whether or not there were rivets in both ends of the patched piece. A. Yes, sir.

Q. Well, state how many in each end.

A. I think there was probably about three or four rivets in each end of the patch, and then there was a couple of rivets in the piece that had been set in.

Q. Were those rivets or bolts?

A. Rivets.

Q. What would be the difference between rivets and bolts?

A. A bolt is put on by means of a nut and screw, and these rivets were merely put in and welded.

Q. State whether or not the heads of the rivets in the groove part, or—yes, the groove part of the

(Deposition of F. J. Taylor.)

shive-wheel where the cable was on that side, were flush with the flange, or countersunk?

A. They were flush.

Q. I mean were they flush with the flange, or did they protrude? A. They were flush.

Q. Do you know whether or not any rivets—now do you know about how far above the bottom of the patched piece, the piece they used as a patch, the lowest rivet hole was?

A. Well, of course I couldn't say positively; but I should say about a half or three-quarters of an inch below the bottom of the patch.

Q. Do you know about the size of the rivets or rivet holes?

A. I should say they were either half or five-eighths of an inch.

Q. That is, the diameter of the rivet hole?

A. Yes, sir.

Q. Now, Mr. Taylor, if there is any circumstance or circumstances that makes you certain that the wheel you put up there two or three weeks before the accident, was the same identical wheel that you took down on the morning of the accident, you may state what they are.

A. Well, in the first place, I did all that work that was done up there or helped to do it, and the marks of the patch were on there where it had been patched when it was put up.

Q. What was the size of the wheel you put up before the accident?

(Deposition of F. J. Taylor.)

A. I think it was six-foot six, the outside of the rim.

Q. How did it compare in size with the wheel you took down after the accident?

A. The same size.

Q. How did it compare with the wheel you took down as to the material it was made out of?

A. It appeared to be the same—to me.

Q. Over which compartment had you put up that wheel two or three weeks before that?

A. The one next to the manway.

Q. The ore-hoist, next to the manway?

A. Yes, sir.

Q. Over which compartment was the wheel that you took down the morning of the accident.

A. Over the same one.

Q. When you took down the shive-wheel on the morning of the accident, state whether or not you saw the cable over the wheel. A. No, sir.

Q. State whether or not you saw the cable over the adjoining wheel? A. Yes, sir.

Q. State whether or not there was a cable missing over any other shive except over the one you took down the morning of the accident.

A. No, sir.

Q. Do you know what had become of the cable that belonged over the wheel which you took down?

A. Yes, sir.

Q. What?

A. It was broken; part of it went down the shaft, and the rest was around the drum.

(Deposition of F. J. Taylor.)

Q. How do you know it was broken?

A. Because I saw the broken ends.

Q. Whereabouts?

A. I saw one end on the drum, and the other was taken out of the shaft later on.

Q. Now, this shive-wheel that you have spoken of, what did it revolve upon?

A. It was set on a steel shaft, set in boxes and timbers.

Q. Do you know about what was the diameter of the steel shaft it set upon?

A. About six inches—five and a half, something like that.

Q. Now, Mr. Taylor, I want to ask you this question: When you took this wheel down on the morning of the accident, what had become of the patched piece that you saw on it when you put it up before the accident? A. That part of it was gone.

Q. State whether or not when you saw it the morning of the accident and took it down, there was any patch piece upon the wheel at all.

A. No, sir, there was no patch on it.

Q. You say that you put up this shive-wheel two or three weeks before the accident?

A. Yes, sir, about that time.

Q. Where did you get the wheel, the patched wheel, that you put up two or three weeks before the accident?

A. Got it on the surface, near the shaft there.

Q. Had it been brought there for you, or had you anything to do with bringing it there?

(Deposition of F. J. Taylor.)

A. It was brought there.

Q. You don't know then where it came from?

A. No, sir, not positively.

Q. Mr. Taylor, I understand you to say you are a carpenter? A. Yes, sir.

Q. And have been for the last ten years or so?

A. Yes, sir.

Q. State whether or not, in your experience as a carpenter, building bridges, and shaping timbers for shafts in mines, and house work, you had occasian to become familiar with and know in a general way the strength of timbers to sustain weights that are placed upon them? A. Yes, sir.

Q. In your opinion—and I understand you to say you are familiar with the Treadwell shaft over there in question? A. Yes, sir.

Q. And have framed timbers for it?

A. Yes, sir.

Q. In your opinion, would three sticks of timber, twelve by twelve inches—three sticks of Alaska spruce timber, twelve by twelve inches, fourteen feet long, inclined across the shaft at an angle of forty-five degrees, situated at the seven hundred and fifty foot level of that shaft, be sufficient to stop a skip and load weighing say ten thousand five hundred pounds, dropped down a distance of say six hundred and fifty feet? A. No, sir.

Objected to by counsel for the defendant on the ground that the witness hasn't shown himself qualified to answer it. And for the further reason that

(Deposition of F. J. Taylor.)

there is no evidence in the case showing that the timbers in question were Alaska spruce, and it is therefore irrelevant and immaterial.

Overruled.

Q. Do *you, Mr. Taylor,* of any timber in this country, Alaska spruce, Oregon fir, white pine, or any other kind of timber which, if placed as I have described to you, would sustain the weight I have mentioned, falling the distance I have mentioned?

A. No, sir.

Counsel for defendants urges the same objection as last above.

Overruled.

Q. Is there any such timber?

A. Not to my knowledge.

Q. Do you know, Mr. Taylor, what the breaking strength of such timbers as I have described are—what weight would they sustain?

A. Well, generally I would have to look up the authorities on a question like that.

Q. Have you ever investigated and calculated from any authorities what the breaking strength of such timbers would be? A. Yes, sir.

Q. What authorities?

A. Trautwine on Civil Engineering is about the best one I know.

Q. Well, now you have made a calculation based on Trautwine's figures, as to what would be the breaking strength of such timbers?

A. As near as I can state from memory, it is three hundred and thirty-three thousand pounds.

(Deposition of F. J. Taylor.)

Q. You understand I am speaking of Alaska spruce, Oregon fir, or Oregon pine timbers?

A. Yes, sir.

Q. Now, Mr. Taylor, do you know, or have you made calculations as to what would be the force of impact of a body weighing, say, 10,500 pounds dropped six hundred feet?

A. No, not exactly. I have made it drop a distance of six hundred and fifty feet.

Q. Well, six hundred and fifty, then. You say you have made a calculation of that, based on Trautwine's figures? A. Yes, sir.

Objected to by counsel for defendant, as leading.

Overruled.

Q. State what it is.

A. I am not just sure, but it is something over six million pounds.

Objected to by counsel for defendant as too indefinite to be conclusive in any way.

Overruled.

Q. I understood you to say you framed timbers for this shaft, and know its dimensions?

Q. About what are the dimensions in the clear, between the shaft—timbers that line the shaft—what are the dimensions of the ore-compartment, next to the man-hoist? A. Four by six feet.

Q. Well, now, about where would this skip, the edge of this skip strike the timbers, placed as I have described to you, 12x12 inches and 14 feet long placed at an angle of 45°—about how far from the edge of the shaft?

(Deposition of F. J. Taylor.)

A. Well, it would strike nearly a foot inside of the shaft timbers.

Cross-examination.

(By Mr. COBB.)

Q. How much are you getting for your testimony in this case, Mr. Taylor?

A. Whatever the Court allows, I suppose.

Q. What are you to get?

A. I believe they allow two dollars a day.

Q. Do you mean to say that you have no agreement for anything further in case the plaintiff finally recovers? A. No, sir.

Q. Has there been any promises to you of anything further? A. No, sir.

Q. Has there ever been any suggestions of anything of that sort? A. Not that I know of.

Q. Is that the best answer you can give to the question? A. Yes, sir.

Q. You stated that the piece that had been broken out of the wheel was twelve to fourteen inches long?

A. To the best of my knowledge.

Q. Did you measure it?

A. I don't remember of measuring it.

Q. You didn't measure its depth either, did you?

A. No, sir.

Q. And it might not have been more than six or eight inches? A. Yes, it was.

Q. How do you know it was?

A. Because I know the difference between eight inches and a foot.

Q. Four inches, isn't it? A. Yes, sir.

(Deposition of F. J. Taylor.)

Q. Did you pay any attention with reference to calculating its length at the time?

A. No, sir, any more than seeing it there several times.

Q. And your estimate of its length is but an opinion?

A. Well, it's based on my best judgment, of course.

Q. Will you take a piece of paper and draw the shape of this piece that was broken out, to the best of your recollection? A. I believe I can.

Q. Will you do so, and give it to the notary to be attached as a part of your testimony?

A. Yes, sir.

Q. Let's see you do it.

A. (Witness draws diagram.)

Q. Just mark it with the letter "A" and write your name on it for identification. (Witness complies with request of counsel.) You say the piece, at its deepest place, was broken out to what depth?

A. I should say about two and a half inches.

Q. Not greater than that, was it?

A. Well, I couldn't say positively, of course.

Q. That's your best recollection, two and a half inches. Now will you take another piece of paper and make a drawing showing the way what you call the "patch" was put on over the outside of the wheel to repair it, lay with reference to the patch itself, and showing the rivets in it?

A. I don't believe I understand you.

(Deposition of F. J. Taylor.)

Q. Take another piece of paper and make a drawing of the piece broken out of the flange of the wheel, and the piece that was put on as a patch over that, showing how it fitted over it and where the rivet holes were that you testified to?

A. (Witness makes drawing.)

Q. Just mark that "B," and write your name on it for identification, and pass it to the notary. (Witness complies with request of counsel.) Now, I believe you stated when you took the wheel down on the morning of the accident, there was a piece broken out of the entire perimeter of the wheel, between three and five feet long? A. Yes, sir.

Q. I'll ask you if it isn't a fact that you testified when on the stand in this case that the piece was between two and three feet long?

A. I don't think so.

Q. Are you positive about that?

A. I'm not positive as to what I testified on the stand—not the exact words.

Q. Well, if you did so state, which do you think is the best estimate of the length?

A. I know it was between three and five feet.

Q. How do you know?

A. I know it was broken near one of the spokes and over to near second one, the next section, and the spokes are three feet apart.

Q. You didn't measure the length of the piece broken out, did you? A. No, sir.

Q. And in your estimate you have allowed a margin of two feet, have you?

(Deposition of F. J. Taylor.)

A. I couldn't be positive how—

Q. I say, you allow a margin of two feet?

A. Yes, sir, I do.

Q. It may, as a matter of fact, be nearer three feet than five feet so far as you can tell?

A. No, sir.

Q. Well, why do you state, then, it was between three and five feet?

A. I should say it was between that.

Q. Which is the nearest estimate, three or five feet? A. I should say five feet was.

Q. How much nearer?

A. I couldn't say positively.

Q. You're positive, then, it was more than four feet?

A. I should say it was at least four feet, if not more.

Q. How much more? A. I couldn't say.

Q. You are positive it was more than four feet in length?

A. I couldn't say positively, but that is my best judgment.

Q. Then if you are positive it is more than four feet, why do you say it was between three and five feet?

A. I didn't say I was positive it was more than four feet.

Q. You didn't? A. I did not.

Q. As a matter of fact, Mr. Taylor, after this length of time, and the fact that you didn't take any

(Deposition of F. J. Taylor.)

particular notice of the length of that break, your estimate of it is an opinion, isn't it?

A. I can't say that it is.

Q. Then it isn't an opinion? A. No, sir.

Q. What is it, then?

A. Well, it's the best knowledge I have on the question.

Q. Well, it's a mere estimate, isn't it?

A. I suppose you would say that; yes.

Q. Now, you stated that you took this wheel down on the morning of the 5th day of August, 1903, shortly after seven o'clock?

A. I couldn't say the date; I know it was the morning after the accident.

Q. Who was with you?

A. The only man I can remember was the foreman.

Q. Don't you remember of Mr. Miller being there?

A. I can't say that he was there at that time, but I know he was sometimes around there.

Q. Do you know whether Mr. Hamilton was there?

A. I don't remember of ever seeing him on the works; no, sir.

Q. You don't know positively who the other men were—you say there were four of them?

A. There might have been twenty around there as far as I know; I didn't say how many.

Q. Then your recollection of who was present there isn't very accurate, is it? A. No, sir.

(Deposition of F. J. Taylor.)

Q. How long did it take to take that wheel down?

A. Well, we must have been pretty near all the forenoon.

Q. You can't be positive, then, about what hour you finished the job?

A. Well, it took at least an hour and a half to take the shive-wheel down.

Q. That's what I am asking you about.

A. Well, perhaps an hour or two.

Q. That would take till about half-past eight o'clock? A. Yes, sir.

Q. Where did you go then? A. Nowhere.

Q. What did you do next?

A. I took the wheel down and crated it up.

Q. Who helped you? A. I couldn't say.

Q. Did you do it alone? A. No, sir.

Q. Do you know what that wheel weighed?

A. Well, about nine hundred pounds, I should say.

Q. That's your best estimate? A. Yes, sir.

Q. Don't you know it weighed over sixteen hundred pounds? A. No, sir; I know it didn't.

Q. How do you know that?

A. By handling it.

Q. Did you lift it? A. No, sir, not alone.

Q. How many men did it take to lift it?

A. I couldn't say now, I'm sure.

Q. But you're positive those wheels don't weigh 1600 pounds? A. I am, sir.

Q. You are positive even if you were shown the actual weight of the wheels? A. Yes, sir.

(Deposition of F. J. Taylor.)

Q. And if they were put on the scales and actually weighed sixteen hundred pounds, the scales would be wrong?

A. Yes, sir, I would know there was something wrong with the scales.

Q. What did you do with that wheel after you took it down? A. Crated it.

Q. Anybody help you do that? A. Nobody.

Q. When did you finish that?

A. Sometime in the forenoon.

Q. Where did you get the lumber to crate it with?

A. Right at the lumber piles.

Q. Where is the lumber pile?

A. Next to the shaft-house.

Q. Outside or inside? A. Outside.

Q. Then at some time you did go out of sight of the wheel before you had finished crating it?

A. I don't remember.

Q. How could you get the lumber if you didn't?

A. It was right there.

Q. You had to go outside to get it?

A. Yes, sir.

Q. Then when you went outside wasn't you out of sight of the wheel? A. It was outside too.

Q. You took it outside of the shaft-house?

A. Yes, sir.

Q. And that was done immediately?

A. Yes, sir, as soon as the ropes were taken off.

Q. Don't you know, as a matter of fact, that that wheel wasn't crated until two or three days afterwards? A. I know it was.

(Deposition of F. J. Taylor.)

Q. Who helped you crate it? A. Nobody.

Q. Crated it yourself, did you? A. I did.

Q. Did you notice particularly the break at either end of the wheel—I mean at either end of the break?

A. Yes, sir.

Q. Now, just take a piece of paper and draw that break to the best of your recollection.

By Mr. JENNINGS.—You're talking of the break in the perimeter, are you, Mr. Cobb?

By Mr. COBB.—Yes, sir.

A. (Witness makes diagram of break.)

Q. Just mark that "C" and write your name on it for identification. (Witness does so.) Now, all of these papers are to be attached as a part of the cross-examination of this witness, Mr. Gillette. Now, in making this drawing, you have shown one of the spokes of the wheel about half gone—is that the way you recollect it?

A. There was a part of the spoke gone; I don't know how much.

Q. Did you notice any mark of the rope on the wheel where it had been broken?

A. Nowhere except in the groove where it run.

Q. Did you notice anything in the wheel showing that the rope had been cut by the sharp edges?

A. No, sir; I don't remember of anything.

Q. You stated you had made a study, and knew the breaking strength of Alaska spruce. Did you get that from Trautwine? A. Yes, sir.

Q. Does Trautwine give the breaking strength of Alaska spruce? A. I think it does.

(Deposition of F. J. Taylor.)

Q. You have examined it—are you positive?

A. I don't know that it mentions Alaska spruce, but it mentions spruce.

Q. Do you know what is the breaking strength of a beam of spruce fourteen feet long and 12x12 inches in size?

A. Well, a safe load, I think, is seven thousand seven hundred pounds, as I remember it.

Q. I'm not asking what is a safe load; I am asking what is its actual breaking strength?

Objected to by counsel for the plaintiff as not a fair question to the witness. These calculations are made up from tables, and to ask the witness to state from memory is not fair.

Overruled.

A. (Witness makes calculations.) Twelve by twelve timbers would stand a strain of nineteen thousand four hundred pounds.

Q. With the weight applied where?

A. Well, that is with the weight applied all over it.

Q. From one end to the other of the beam?

A. Yes, sir.

Q. Is this calculation based upon the hypothesis that the ends of the beam are free or that they are fastened in an absolutely tight, vise-like grip?

A. That is immaterial.

Q. You say that is immaterial?

A. Yes, sir, as long as the timber has bearing enough to keep it from sheering, or splitting or crushing at the ends.

(Deposition of F. J. Taylor.)

Q. What weight would such a beam hold if the weight was applied within a foot of the end?

A. I would have to look that up in the tables.

Q. Then you don't know?

A. I'm not positive as to that.

Q. What difference in its bearing capacity would it have if it was inclined at an angle of 45°?

A. Well, it would have about twice the strength.

Q. Do you know what that would be?

A. To take time I can figure it out.

Q. You haven't figured that up, then?

A. Yes, sir, I have figured it before.

Q. What is it? Where are those figures?

A. Probably burnt up by this time.

Q. Did you figure it up in this case?

A. No; I was never asked to figure it up.

Q. Didn't you show those figures to counsel for the other side?

A. I believe I told them what it was—never showed them.

Q. Did they ask for them? A. No, sir.

Q. From whose formula did you do that figuring?

A. From Trautwine.

Q. Did you make any calculations for Oregon fir?

A. Yes, sir.

Q. What did you find to be the figures for Oregon fir? A. That is one-sixth stronger.

Q. I asked for the figures, not the proportions.

A. There is different figures, different sizes of timbers and different lengths.

(Deposition of F. J. Taylor.)

Q. I ask you for the figures on timbers fourteen feet long and 12x12 inches?

A. (Figuring.) Twenty-two thousand, six hundred and eighty pounds.

Q. For one timber? A. Yes, sir.

Q. Then, if that timber, you say, was inclined at an angle of 45° it should sustain twice that amount?

A. Yes, sir.

Q. Suppose the whole weight was applied within one foot of the end of it, would that make any difference?

A. I don't think it would, very much.

Q. Would it make any? A. It would, yes.

Q. Would it sustain a much greater weight?

A. Very little. Those figures are given with the weight distributed evenly along it.

Q. I understand. Now, you stated a while ago that a weight of 10,000 pounds dropped six hundred and fifty feet would develop a force of six million pounds? A. A little over that.

Q. What did you figure that on?

A. From Trautwine's tables.

Q. You couldn't figure that, I suppose, without the assistance of the formulas given?

A. No, sir.

Q. And your figures on it wouldn't be worth any more than those of any other mathematician?

A. Not if they went strictly by the rules in the books.

(Deposition of F. J. Taylor.)

Q. That's what I mean. Now, you say you saw a piece of rope that was brought up attached to the skip—when did you see that?

A. Well, it was several days afterwards.

Q. How long was it?

A. I never measured it.

Q. You didn't make any memorandum, I suppose. You're very positive about some of your testimony—can't you give an estimate?

A. It looked like it was over a hundred feet long—I couldn't say though.

Q. Where was it?

A. It was taken up and laid on the floor of the shaft-house when I saw it.

Q. How big is the shaft-house, the room you saw it in?

A. The floor is probably thirty or forty feet square, that part of it.

Q. Now, did you examine the ends of the broken piece? A. Not of that piece.

Q. Did you examine the broken ends of the other piece? A. Yes, sir.

Q. What sort of a break was it—did it show any indications of a cut?

A. I don't remember as to that.

Redirect Examination.

By Mr. JENNINGS.—Mr. Taylor, I neglected to ask you on direct examination how many spokes there were in the wheel, in the patched wheel, that you put up two or three weeks before the accident?

A. I believe there were six.

(Deposition of F. J. Taylor.)

Q. Now, where was the patched piece with reference to the spokes, that is to say, over one spoke or between two spokes?

A. It was between two spokes?

Q. Now, this plat you have drawn for Mr. Cobb, these sketches, you don't claim they are drawn to a scale, do you? A. No, sir.

By Mr. CHENEY.—Mr. Cobb asked you if you crated this wheel all alone, and you stated you did. Do you mean by that that you moved the wheel alone or made the crate alone?

A. I built the crate alone.

Q. And in putting the wheel into the crate did anybody help you? A. Yes, sir.

Recross-examination.

By Mr. COBB.—Who helped you?

A. I couldn't say, I'm sure. Probably some of Mr. Kinzie's Slavonians.

Q. I believe when you testified on the stand in this case you stated you had considerable ill-feeling for Mr. Kinzie, Superintendent of the Treadwell Company? A. Yes, sir, a little; yes, sir.

Q. And that feeling still exists, doesn't it?

A. I think it does; yes, sir.

Redirect Examination.

By Mr. JENNINGS.—Mr. Taylor, do you mean by that that you have any ill-feeling of the Alaska Treadwell Gold Mining Company, the defendant in this case? A. No, sir; not at all.

Q. You simply don't like Mr. Kinzie, personally?

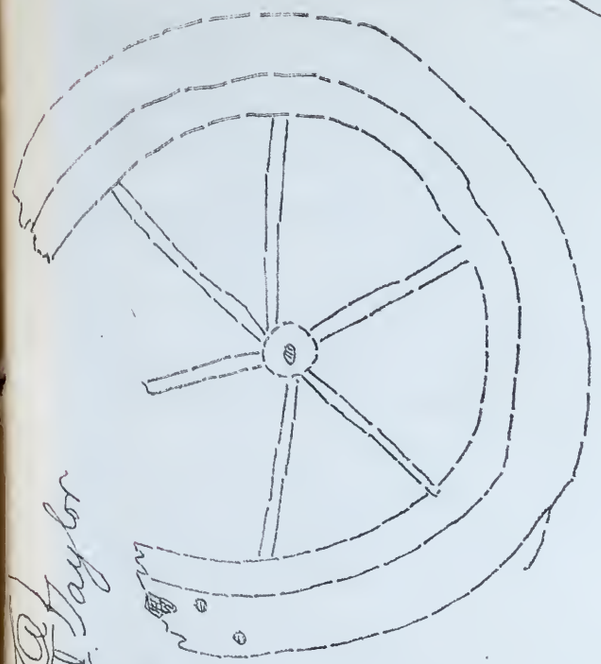
A. No, sir, I don't like him as a man.

Top

F. J. Taylor

(a)

Bottom



F. J. Taylor

(B)

(About half size) F. J. Taylor

[Testimony of Don S. Rea.]

DON S. REA, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JENNINGS.)

Q. Please state your name.

A. Don S. Rea.

Q. Where do you reside?

A. In Juneau.

Q. How old are you?

A. Forty-three years of age.

Q. What is your occupation?

A. Miner.

Q. How long have you been a miner?

A. About twenty-five years.

Q. Quartz mining or placer mining?

A. Both.

Q. State to the jury what experience you have had as a miner—have you had any experience in vertical shafts, hoists, skips, sheave-wheels, etc?

A. Yes, sir.

Q. Have you had any experience in such mines while they were sinking shafts? A. Yes, sir.

Q. State to the jury what experience you have had in such mines.

A. I have worked in different shafts for the last twenty years back and forward.

Q. Where about?

A. Sinking shafts working in drifts.

(Testimony of Don S. Rea.)

Q. Give us the names of some of the mines you have worked in.

A. In the Virginia mine, in Colorado.

Q. Was that operated by a vertical shaft?

A. A perpendicular shaft; yes, sir. The Young Girl, the Silver Bell, in the same country.

Q. Where else?

A. I have worked in the Coeur d'Alene on the Deger shaft. I have also worked in the Colorado and Bi-Metalic.

Q. All mines operated by perpendicular shafts?

A. Yes, sir.

Q. Have you had any experience in the way of sinking shafts? A. Yes, sir.

Q. Contract work? A. Yes, sir.

Q. State where some of them were?

A. I helped to sink the Deger shaft about one hundred feet of it in the Coeur d'Alene in Idaho.

Q. Did you have any other experience in contracting?

A. Not on contract—that is the only contracting I ever did.

Q. In addition to the mines you have mentioned as helping sink have you had any experience in seeing other shafts sunk by other people?

A. Yes, sir; I have been around considerable.

Q. Have you ever been in that connection—did it ever come under your observation in mining where the work of sinking a shaft was in progress at the same time hoisting was going on over head?

(Testimony of Don S. Rea.)

A. Yes, sir.

Q. And where men were at work sinking shafts at the time? A. Yes, sir.

Q. And the operation of hoisting was going on above them?

Mr. COBB.—We object to that as leading.

COURT.—Yes, it is leading.

Q. Did you observe and can you state what is the usual and necessary precautions to be taken for the safety of the men engaged in sinking the shaft?

A. Yes, I think I have.

Q. What is it.

Mr. COBB.—We object to that and ask leave to examine the witness on his qualification.

COURT.—I suppose upon his qualifications the defendant may examine him before he gives expert testimony.

(By Mr. COBB.)

Q. Did you ever have charge of a mine being operated on anything like a large scale?

A. Not in actual charge of any big mines; no, sir.

Q. Just worked as a miner?

A. Working as a miner and a contractor.

Q. Day wages? A. Also as a contractor.

Q. The only contract you had was the Coeur D'Alene? A. Yes, sir.

Q. It was not your business to plan any precautions which were to be taken in the mine?

A. No, not any more than for my own protection.

(Testimony of Don S. Rea.)

Q. Nothing more than if you had seen anything dangerous you would not have gone there?

A. No, sir.

Q. You never did any of that kind of work yourself? A. Yes, sir.

Q. Plan the work? A. No, sir.

Q. Your experience is limited to your employment around mines?

A. My experience has all been practical work.

Q. That practical work has never included the planning of mines or how the shafts were to be sunk of the precautions to be taken for the safety of the men—you never planned anything of that kind?

A. No, sir, not altogether myself.

Mr. COBB.—I think he is disqualified.

COURT.—Objection overruled. The jury may discover if he is qualified and how far they are to be guided by his testimony.

(By Mr. JENNINGS.)

Q. State what was the usual precautions which you observed in any of the mines in which you worked while the work of hoisting was going on over head—what precautions were taken for the safety of the men?

A. I always notice that the skipman looked after the rope.

Q. What?

A. The skipman generally looked after the rope.

Q. I want to draw your attention particularly to the bulkheads? A. Bulkheads?

(Testimony of Don S. Rea.)

Q. Did they usually have bulkheads?

A. Yes, they always had bulkheads.

Q. You say they erected bulkheads?

A. Yes, sir.

Q. What kind of bulkheads did they erect—can you draw a diagram on that blackboard?

A. Yes.

COURT.—You cannot get it in the record that way.

Mr. JENNINGS.—I just wanted the jury to understand it.

COURT.—Well, get him to draw it on a piece of paper.

Q. Mr. Rea, I will get you to draw a diagram of the different kinds of bulkheads that you have seen in those mines.

A. I have seen three different kinds of bulkheads in the mine.

COURT.—You mean the Treadwell mines?

Mr. JENNINGS.—No, we claim this was not a proper bulkhead and he says he knows of three different kinds that are usually used and I want to show to the jury what they are.

(Witness draws diagram.)

Q. Just step down here, Mr. Rea, so the jury can see it?

Mr. COBB.—Just a moment. We wish to object to this drawing going in as wholly irrelevant to any of the issues in this case.

COURT.—I am inclined to sustain the objection, Mr. Jennings.

(Testimony of Don S. Rea.)

Mr. JENNINGS.—What I propose to show was the different kinds of bulkheads in common use and to show that the bulkhead which they had was unsafe.

COURT.—I do not believe that is necessary. If this was insufficient it cannot be helped by something else which did not exist at that place at that time. The objection will be sustained.

Mr. JENNINGS.—I wish to save an exception.

Q. Well, Mr. Rea, I will ask you what you think of this kind of a bulkhead. A shaft is being sunk eight or nine hundred feet in depth and men are sinking a shaft with machine drills at the bottom at the same time the work of hoisting is going on over their heads. The bulkhead to protect the men is constructed of three twelve by twelve timbers set at an angle of forty-five degrees at the 750-foot level—state whether or not you consider that a reasonably safe protection for the men working at the bottom of the shaft?

(By Mr. COBB.)

Q. Have you ever seen that kind of a bulkhead?

A. I have seen that kind of a bulkhead over there.

Q. You never saw that kind of a bulkhead outside? A. No, sir.

Q. You never helped to build one?

A. Not of that description.

Q. And you say you have had no experience yourself in planning the construction of bulkheads?

A. Not in planning the construction of any.

Q. You have worked in some when someone else did the planning? A. Yes, sir.

(Testimony of Don S. Rea.)

Mr. COBB.—We object on the ground that he is not qualified to give expert testimony on that question.

COURT.—Go ahead.

Q. What do you say as to whether that was a reasonably safe bulkhead?

Mr. COBB.—We object to the question in that form.

COURT.—I am inclined to sustain the objection.

Q. I will ask this question then.

A. Mr. Rea, some men are sinking a shaft in the bottom of a mine between eight and nine hundred feet in depth. While they are sinking with machine drills working at the bottom of the shaft the work of hoisting the ore from the 750-foot level is going on over their heads. The work of hoisting is being carried on by means of a skip with safety clutches suspended by a wire cable. A bulkhead is built at the 750-foot level consisting of three twelve by twelve timbers hitched into the side of the shaft—they are inclined at an angle of forty-five degrees across the length of the shaft. The size of the shaft is four by six feet. The ends of the timbers are set in the walls of solid rock and there is nothing on top of those timbers—nor dirt nor rock of anything except those three timbers. The timbers are made of Alaska spruce. *On the side of the shaft.* On the side of the shaft are guides and on the skip are runners. That is the skip runs on runners. State whether or not that is a safe bulkhead for the protection of the men at the bottom of the shaft?

(Testimony of Don S. Rea.)

Mr. COBB.—We object to that unless he includes the element of the safety clutch.

COURT.—He said there were safety clutches.

Mr. COBB.—We object on the ground that the witness has not shown that he is qualified to answer the question.

COURT.—The jury will understand and determine how far they will be guided by his testimony. He has offered some testimony as to his experience.

Q. Answer the question as to whether or not you consider that a reasonably safe bulkhead?

A. Well, a bulkhead of that kind in my opinion—it could not fall very far—it would be stopped by the clutches.

Q. You mean the clutches might catch—but if the clutches did not catch?

A. If it fell three or four hundred feet I would not work in it—I do not think it would be safe.

Q. Have you ever seen bulkheads in shafts in which they were using skips with clutches on them?

A. It is common to have clutches on cages.

Q. Is it common practice to have clutches—to have bulkheads in addition to clutches?

Mr. COBB.—Object to that—

COURT.—Overruled.

A. Yes, sir.

Q. Did you ever carry on any kind of business except mining since you arrived at manhood?

A. Yes, I have to some extent.

(Testimony of Don S. Rea.)

Q. Just state again what mines—how many bulkheads you have seen or observed or had any experience with?

A. I could not say how many—a good many.

Q. Have you observed twenty? A. Yes.

Q. Fifty?

Mr. COBB.—Objected to as leading.

COURT.—Overruled; he is merely asking for the number.

A. I would not say I had seen fifty.

Q. Do you know what kind of a bulkhead would be safe in a case of that kind?

A. I have seen bulkhead that the ore buckets could not go through.

Q. What kind of a bulkhead was that?

Mr. COBB.—We object to that as incompetent, irrelevant and immaterial.

COURT.—I am inclined to sustain the objection. It don't seem to me to be material.

Q. I believe you said you had seen bulkheads of that kind? A. Yes, in small shafts.

Q. That kind is not intended to stop a falling skip? A. No.

Q. They are made to keep rock and things like that from falling through.

A. Yes, they stop the rocks or anything like that and throw them into the chute.

Mr. CHENEY.—I would like to ask one or two questions.

(Testimony of Don S. Rea.)

(By Mr. CHENEY.)

Q. In case there was a small platform made of 6x10 timbers laid flat some sixty feet below the 750-foot level and the bulkhead described by Mr. Jennings—would that, in your opinion, add anything to the safety of the men in case a skip fell down the shaft and through the bulkhead?

Mr. COBB.—We object to that.

COURT.— Overruled.

A. If the skip *when* through the bulkhead I don't think it would hold anything.

Q. You think if the skip went through the main bulkhead it would not add anything to the safety of the men? A. No, sir.

Q. I believe you stated that you would not work there?

Mr. COBB.—Object to his leading the witness.

COURT.—Overruled.

A. I simply stated that I would not care to work under a bulkhead of that kind.

Q. You have had twenty-five years experience in quartz mining? A. Yes, sir.

Q. In Colorado, the Coeur D'Alene and in Alaska? A. Yes, sir.

Q. Have you worked in the Treadwell mine?

A. Yes.

Q. Underground or outdoors?

A. I have worked in the Mexican mine.

Q. You mean on Douglas Island?

A. Yes, sir.

That is all.

(Testimony of Don S. Rea.)

Cross-examination.

(By Mr. COBB.)

Q. You say you have had twenty-five years' experience in and about mines?

A. I have been mining twenty-five years.

Q. How much of the time have you been working in a shaft?

A. I could not say exactly how long I worked in a shaft. Generally in the winter I worked in a shaft and in the summer I generally prospect. I have done that for a good many years.

Q. Where did you first work in a mine?

A. The first work I ever did in a shaft was in Canada in an asbestos mine.

Q. When was that?

A. I do not remember it was when I was about fifteen, or sixteen.

Q. How old are you? A. Forty-three.

Q. That would be twenty-four or five years ago?

A. Yes, sir.

Q. How long did you work there?

A. I do not remember—three or four years.

Q. Well, two or three?

A. I guess two or three—I would not be certain—it is so long ago that I do not remember.

Q. In what capacity did you work?

A. Hand drilling, double-hand drilling and helping run a machine drill.

Q. You are just a labor?

A. Simply a laborer learning to mine.

(Testimony of Don S. Rea.)

Q. How deep was that mine?

A. It was not deep at all—just a quarry.

Q. You did not get any experience in shafts there? A. We sank quite a few.

Q. I say you did not get any experience in sinking shafts or with bulkheads there? No, sir.

Q. Where did you next work?

A. I believe I worked next in Capleton.

Q. Where is that?

A. Up near Sherbert, in Canada.

Q. What kind of a mine was that?

A. Copper mine.

Q. How deep was that?

A. I do not remember—it was an incline shaft.

Q. You did not get any experience with bulkheads and vertical shafts there? A. No.

Q. How long did you stay there?

A. I don't know, I don't remember.

Q. Can you give us any idea?

A. I cannot give you any idea—I do not remember.

Q. One year?

A. I don't know—I don't remember.

Q. You could not state whether it was as much as one year or not?

A. I do not remember—a year or a year and a half—I might have been a year or over.

Q. Do you remember whether you were there as much as two years?

A. I do not think it was.

Q. Between one or two years? A. Yes, sir.

(Testimony of Don S. Rea.)

Q. Where did you next work?

A. I think the next was on the Canadian Pacific Railway.

Q. Not mining? A. No, on railroad.

Q. Where did you work there?

A. On the Canadian Pacific, on the railroad between Workhall and Fort Arthur.

Q. What was you doing there?

A. Working running a machine.

Q. What kind of work? A. In a tunnel.

Q. How long did you work there?

A. About eighteen months.

Q. You did not get any experience with bulkheads and vertical shafts there? A. No.

Q. Then were did you go? A. California.

Q. Whereabouts?

A. Shasta County, California.

Q. What did you do there?

A. I worked in the McDonald mine.

Q. In what capacity did you work there?

A. Sinking a shaft.

Q. How long did you work there?

A. I worked there until they got the shaft down, about a year.

Q. Sinking a shaft?

A. Helping to sink a shaft.

Q. Did you have charge of a machine?

A. I did not run a machine.

Q. As a day laborer? A. Yes, sir.

Q. Where did you go from there?

(Testimony of Don S. Rea.)

A. I went from there to Trinity County, California.

Q. What year did you go to Trinity County, California?

A. I think it was in 1888.

Q. How old were you then?

A. In 1888—I do not remember I am forty-three now.

Q. You were twenty-four then?

A. Yes, sir.

Q. What did you do there?

A. I worked there in the Brown Bear.

Q. What kind of mining were you doing there?

A. Gold-quartz mining.

Q. In what capacity?

A. I started in to learn amalgamating.

Q. That all the work you done there?

A. Yes, that is all.

Q. How long did you work there?

A. Nine months.

Q. Then where did you go?

A. From there to San Juan.

Q. What state? A. Colorado.

Q. What year did you go to San Juan?

A. In 1889.

Q. Where did you work there?

A. The Virginia mine.

Q. How long did you work there?

A. About eighteen months.

Q. In what capacity?

(Testimony of Don S. Rea.)

A. I worked myself up there. Started in running a donkey and then I ran the engine—then I got to be helper to the mechanic and then I worked in the shaft as timberman.

Q. How long did you work in the shaft?

A. I worked in the shaft about eight or nine months.

Q. Just as a day laborer?

A. I told you I worked as a timberman.

Q. You worked as a laborer you did not hold any official position? A. No.

Q. Where did you go from there?

A. I went from there to Utah.

Q. Where did you work in Utah?

A. At Bingham canyon.

Q. What did you do there?

A. Worked in lead mine.

Q. In what capacity?

A. Worked in the shaft.

Q. What kind of a shaft was that?

A. Incline shaft.

Q. How long did you work there?

A. I do not remember.

Q. In what capacity? A. Skip boss.

Q. How long were you there?

A. I think I was there two years and a half or three years.

Q. How deep was that mine?

A. Sixteen hundred feet.

Q. How big?

(Testimony of Don S. Rea.)

A. One compartment incline shaft run with skips.
Q. How much of an incline?
A. Incline of about forty-five degrees.
Q. Where did you go from there?
A. I went to Tintik.
Q. Did you work in the Tintik mine?
A. Yes, sir.
Q. How long? A. About four months.
Q. What did you do there?
A. Worked in a shaft on a machine.
A. What kind of work?
A. Driving a perpendicular shaft.
Q. What were you doing?
A. I was working in the shaft running a machine.
Q. Sinking a shaft and running a machine?
A. Yes, sir.
Q. Was that shaft vertical or incline?
A. Vertical.
Q. Working in the capacity of a day laborer?
A. No, shift boss.
Q. Had charge of the men down there?
A. Yes, sir.
Q. Where did you go from there?
A. Back to Ashton, California.
Q. What did you do there?
A. Worked in an incline shaft?
Q. How long did you stay there?
A. About a year.
Q. Work all the time in a shaft?
A. Yes, sir.
Q. Sinking the shaft all the time?

(Testimony of Don S. Rea.)

A. No, not sinking all the time.

Q. What were you doing when not sinking the shaft?

A. Repairing the shaft—putting in new walls, taking care of it.

Q. Where did you go from there?

A. From Ashton to Montana and Idaho.

Q. Where about in Idaho?

A. Coeur D'Alene.

Q. Did you work in any mine there?

A. I did.

Q. What mines did you work in there?

A. I worked in the Standard and also worked in the Deger and the Little Gem.

Q. What did you do in the Little Gem?

A. Helped to raise a shaft.

Q. What do you mean by raising a shaft?

A. Making connection with another shaft.

Q. How long did you work there?

A. I worked there until I got through on the contract—six or seven months.

Q. Then did you go the Standard?

A. Yes, sir.

Q. How long did you work there?

A. I worked there on contract until I got through, about four months.

Q. What was you doing there?

A. Drifting on a contract.

Q. Where did you go from there?

A. I went to the Deger.

Q. What did you do there?

(Testimony of Don S. Rea.)

A. Contracted to sink a shaft.

Q. How much of a shaft?

A. One hundred feet.

Q. One hundred feet down?

A. Six-hundred-foot shaft.

Q. How big a shaft?

A. Two compartment shaft.

Q. What were the dimensions?

A. I do not remember exactly what the dimensions were.

Q. Where did you go from there?

A. From there to Montana.

Q. Whereabouts in Montana?

A. Granite.

Q. What mine did you work in there?

A. I worked in the BiMetallic.

Q. What kind of work did you do in the Bi-Metallic? A. In the drift.

Q. How long did you work there?

A. About four months—four or five months—I do not remember.

Q. Then where did you go?

A. To Granite.

Q. What did you do there?

A. Helped to retimber a shaft.

Q. How long did you work there?

A. About five months, retimbering.

Q. Then where did you go?

A. Kept on working there.

Q. What did you do then?

(Testimony of Don S. Rea.)

A. I helped to make connection with the Bi-Metallic and drove a hole through to the Granite.

Q. Helped to drift?

A. Helped to make connections with the Granite shaft.

Q. How long did that take you?

A. Well, that took, I think, three or four months.

Q. Then were did you go?

A. From Granite I went to Grant's Pass in Oregon.

Q. What did you do there?

A. Ran a placer mine.

Q. What year did you go there?

A. I went there in 1899, I believe.

Q. From Montana?

A. Yes, sir; from Montana.

Q. How long did you placer mine there?

A. I placer mined for a year.

Q. Until 1900? A. Yes, sir; until 1900.

Q. Then where did you go?

A. I came up to Alaska.

Q. In 1900? A. The early part of 1901.

Q. Where did you first go on coming to Alaska?

A. Went up the Porcupine.

Q. How long did you stay in the Porcupine?

A. Eight or nine months.

Q. That was in 1901? A. Yes, sir.

Q. What did you do up there?

A. I helped to sink an incline shaft.

Q. What angle was that shaft?

(Testimony of Don S. Rea.)

A. About forty-five degrees.

Q. When you got through there, what did you do?

A. Quit and came down here.

Q. What did you do when you got down here?

A. Went to work on the island.

Q. Do you mean on Douglas Island?

A. Yes, Treadwell.

Q. Where? A. The six-hundred-foot level.

Q. What kind of work?

A. Cutting out ore.

Q. Cutting out ore in the stope?

A. Yes, sir.

Q. How long did you work there?

A. About a month; maybe six weeks.

Q. What did you do when you got through there?

A. Came over here.

Q. What did you do over there?

A. Went to work prospecting.

Q. Have you been prospecting ever since?

A. No.

Q. That was in the year 1902 that you came here from Treadwell? A. Yes, 1902.

Q. How long did you prospect?

A. I prospected between here and on the island four or five months.

Q. Then what did you do?

A. I took charge of the—I have forgotten the name of the company over on the island—the J. P. company.

Q. What did you do there?

(Testimony of Don S. Rea.)

A. I ran a tunnel.

Q. You did not run any shafts? A. No.

Q. How long did that take you?

A. Three or four months over there.

Q. Then what did you do?

A. In the summer I went prospecting.

Q. That was in the year 1903?

A. 1902.

Q. What did you do when you got back in the summer of 1902?

A. In the winter I did not do anything—in the spring I went to work for the Jualpa company.

Q. In the spring of 1903? A. Yes, sir.

Q. Run any shafts for the Jualpa company?

A. No.

Q. How long did you work for them?

A. A year.

Q. That was 1904? A. Yes, sir.

Q. Then what did you do?

A. Went prospecting.

Q. You prospected in 1904?

A. Yes, prospected in 1904.

Q. Then what did you do?

A. In the winter of 1904 I went to work in the Mexican mine.

Q. Work in sinking any shafts there?

A. No.

Q. What did you do?

Q. What do they call the single-hand man keeping the walls straight—cutting them down?

(Testimony of Don S. Rea.)

Q. Dressing down the walls? A. Yes, sir.

Q. In the stopes? A. Yes, sir.

Q. How long did you work there?

A. About four months—between three and four months.

Q. Then what did you do?

A. I came over here and prospected in the summer.

Q. In the summer of 1905?

A. In the summer of 1904.

Q. During the summer, what did you do?

A. That summer I located quite a few claims.

Q. After that what did you do?

A. I went below.

Q. To Seattle? A. Yes, sir.

Q. What did you do in 1905?

A. During the summer of 1905 I did the assessment work on the claims I had located. Then worked up on the mountain over beyond the Perseverance.

Q. What did you do during the winter of 1905 and 1906?

A. In 1905 and 1906 I worked over on the island in the Mexican mine for about three months and the rest of the time I was below.

Q. What were you doing over there?

A. On the same job.

Q. Working in the stopes?

A. I had charge of the men dressing down the walls.

Q. In the stopes? A. Yes, sir.

(Testimony of Don S. Rea.)

Q. Then in the summer of 1906?

A. In the summer of 1906 I was doing my own work up here?

Q. What work? A. My assessment work.

Q. What did you do last winter?

A. I put up a sawmill up here on Salmon creek.

Q. And that is a complete detail of your experience as a miner? A. Yes, sir.

Q. Do you know for what purpose the bulkhead is set at an angle of forty-five degrees?

A. I think I do.

Q. For what purpose?

A. Well, I suppose it would be for the purpose of stopping the rocks that fell down.

Q. Anything else?

A. I suppose the real purpose was to stop the skip.

Q. It might not be?

A. I think that is the object of it.

Q. You don't know positively.

A. I certainly believe it was to stop the skip.

Q. Why put it at an angle then?

A. It would have more of a chance to pitch it into the wall and keep it from breaking through.

Q. Pitch it into the wall?

A. Yes, it would go plumb through it if it was laid flat.

Q. If they were set at an angle of forty-five degrees across the shaft it was for the purpose of pitching it into the wall—would not that have a tendency to push the timbers out at the lower end of the hitch?

(Testimony of Don S. Rea.)

A. No, it would not. It would tend to strengthen it.

Q. If a skip or any other object coming down should strike those inclined timbers and throw it into the wall as you stated, would it not necessarily throw the timbers out of the hitch at the lower end?

A. I don't think it would. It would wedge it down.

Q. What would be the effect of a clutch on a skip falling like that?

A. Well, if the rope parted, the strain on the rope would release the clutch and the clutch would certainly catch in the guides.

Q. Would that have any effect on the strain on the bulkhead?

A. I don't know just what effect it would have on the bulkhead; it would certainly stop it if the clutches worked.

That is all.

Redirect Examination.

(By Mr. CHENEY.)

Q. Did you ever know of a case where those clutches ever worked when a skip fell when it was loaded? A. No.

That is all.

Mr. JENNINGS.—If the Court please, I now desire to read the affidavit of Bernard F. Hefele. I believe the deposition of John B. Thomas comes first.

(Whereupon the said depositions were read.)

Mr. COBB.—The testimony in this case shows that it was cast steel.

(Testimony of W. C. Angell.)

COURT.—Was it shown to this witness?

Mr. JENNINGS.—No, sir, I propose to connect it up.

Mr. COBB.—I ask that it be connected up before the reading proceeds any further.

Mr. JENNINGS.—If the Court will permit me to call one of our witnesses, I just want to ask him certain questions, and I do not think it will take five minutes, and then I will recall him after that on some other matters.

COURT.—Very well.

[Testimony of W. C. Angell.]

W. C. ANGELL, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JENNINGS.)

Q. Please state your name.

A. W. C. Angell.

Q. What is your occupation?

A. Machinist.

Q. You have been a machinist how long?

A. For the last twenty—twenty-one years—since I was 18 years old.

Q. You have served an apprenticeship as a machinist, then? A. Yes, sir.

Q. Please state some of the places where you worked.

A. At the Golden State & Miners' Iron Works in San Francisco.

(Testimony of W. C. Angell.)

Q. How long did you work there?

A. Four years as an apprentice.

Q. What did you do after that?

A. I was continued in the same place for two years as a journeyman machinist.

Q. What business was the Golden State & Miners' Iron works engaged in?

A. Mining machinery, and machinery in general.

Q. Manufacturing machinery?

A. Yes, sir; and repairing.

Q. Did you become familiar with mining machinery while you were working there—did you work on mining machinery while you were there?

A. Yes, sir.

Q. I will just ask you, now, if you ever worked in the Treadwell mine over here? A. Yes, sir.

Q. Were you working there in 1898?

A. Yes, sir.

Q. What part of 1898?

A. I was there from December, 1897, all the year of 1898, and part of 1899.

Q. Did you have occasion—or did you see any sheave-wheel there in 1888, in connection with the hoist?

A. Yes, sir; I had charge of it, installing it.

Q. What was this sheave-wheel made of?

Mr. COBB.—We object to his giving expert testimony on the ground that he has not yet qualified to do so and ask leave to cross-examine him.

COURT.—Very well.

(Testimony of W. C. Angell.)

(By Mr. COBB.)

Q. You say you had charge of the installation of this sheave-wheel?

A. Yes, sir; I had charge of the installation of this sheave-wheel.

Q. It had just been received from the foundry?

A. Shortly before that.

Q. It was in the usual condition in which machinery comes from the manufacturer?

A. The machinery itself?

Q. The wheel?

A. I did not see anything unusual.

Q. I asked you if they were not in the same condition as they were when cast?

A. They were finished and ready for use.

Q. They were also covered with a filler, were they not?

A. No, sir; they were in their naked state.

Q. Do you mean to say that machinery when it is sent out for use does not have a coating of whiting?

A. Whiting?

Q. Covered with a filler or paint?

A. These were not painted.

Q. I do not mean that?

A. If you mean paint—they were not painted.

Q. Nothing on them at all? A. No, sir.

Q. What experience have you had in the study of metallurgy?

A. Only practical experience.

Q. You have never been to a school of metallurgy?

(Testimony of W. C. Angell.)

A. No, sir.

Q. You have simply been a machinist?

A. Yes, sir.

Q. You have never dealt with the science of the composition of metals?

A. You mean the actual component parts of metals?

Q. Yes. A. Only in a casual way.

Q. Just as any other person handling it would have? A. Yes, sir.

Q. How often have you seen them?

A. I may have seen them a hundred times.

Q. You never saw them very close, did you?

A. I could not see them much closer—I handled them.

Q. After that you had no occasion to examine it?

A. I had occasion to handle it in 1902.

Q. You never saw this wheel after it was installed in the mine? A. I simply put them in.

Q. That is all the experience you had with them?

A. You mean at the time—I certainly handled them then.

Q. That is the only time you handled them?

A. I have handled them many times since then.

Q. You mean you saw them? A. Yes, sir.

Q. You say you have had no experience in the science of metallurgy or metals or their composite parts?

A. Simply what I told you—only practical experience.

(Testimony of W. C. Angell.)

Q. Did you make any tests to determine what that wheel was composed of?

A. It would not be necessary.

Q. Answer the question. A. I did not.

Q. Did anybody else?

A. No, sir; not that I know of.

Q. Did anybody call your attention to what it was made of? A. It would not be necessary.

Q. Answer my question. A. Repeat it.

Q. Did anybody call your attention to what it was made of? A. No, sir.

Q. You simply saw it there as you would any other casting? A. Yes, sir.

Q. Can you tell whether a casting is made of cast iron or cast steel by looking at it?

A. In the state just as it comes from the foundry, I could.

Q. How do you tell?

A. Several ways—by the general appearance of the machine—any machinist can tell at once, who understands his business.

Q. Tell us the difference in the appearance, then.

A. A cast-iron casting as it comes from the foundry is a great deal lighter color than a steel casting. The steel casting has a kind of a brown color. A cast-iron casting is smoother than a steel casting. A steel casting is covered with lumps and bumps. There is as much difference in them as there is between ice and water.

Q. Do you know the difference in the component parts between the two metals?

(Testimony of W. C. Angell.)

A. I know the outward appearance of it from handling it.

Q. You did not patch that wheel?

A. Not that I remember of.

Q. Your opinion as to what that wheel was composed of is simply based upon the appearance of it as you saw it when it was installed and as you saw it afterwards? A. I did not state that exactly.

Q. Mr. Jennings asked you what it was composed of, and now I am asking you if your opinion as to whether it was cast-iron or cast steel is based upon your observation of it at the time you installed it—put it up?

A. It is based on my knowledge of cast-iron and cast steel as I handled it.

Q. That is the only way you know?

A. That is all that is necessary.

Q. That is all you know about it? I did not ask you whether that was all that was necessary or not.

A. Yes, sir.

Mr. COBB.—We object to this witness giving expert testimony on the question of the material in this wheel for the reason that he is not qualified to do so.

COURT.—Objection overruled.

(By Mr. JENNINGS.)

Q. What was that wheel composed of?

A. Cast iron.

Q. What did you say—it was made of cast iron?

A. Yes, sir, it was.

(Testimony of W. C. Angell.)

Mr. JENNINGS.—That is all for the present. I will want to recall this witness later on another matter.

(Whereupon Mr. Jennings continued to read the deposition of J. B. Thomas without objection until the following question was reached:)

Q. I will ask you a question: A weight of 10,500 pounds is to be hoisted vertically about 750 feet. It is being done by means of a wire cable 1⅛ inches in diameter; the cable being attached to the weight passes up and over a sheave-wheel situated at the other end of this distance of 750 feet; thence it passes to a drum, around which it is wound by the action of steam. The sheave-wheel is cast iron and is about six feet in diameter, and the flanges of the sheave are in proper proportion; the wheel has six spokes. This sheave-wheel breaks in this way: A piece about twelve or fifteen inches in length and 2 or 3 inches in depth breaks out of one of the flanges between the spokes—the break extending below the top of the cable and lying in the groove. The break which I have described is repaired in the following way: A piece the size of the broken piece is laid back in the space broken out. A piece of iron is then placed on the outside of the broken flange, covering the break in depth and extending about four or five inches over each end. It is then riveted at each end of the piece put over, 3 or 4 rivet holes at each end and being counter-sunk. In your opinion is a sheave-wheel so broken, and so repaired, a fit and suitable piece of machinery for hoisting?

(Testimony of W. C. Angell.)

Mr. COBB.—We object to the question; the witness has not qualified himself to answer the question. The testimony is incompetent and immaterial. His only qualification asked or directed to him would you know whether that was a proper or improper repairing of the flange. It is not shown in the testimony that it was repaired.

COURT.—The objection may be overruled and the jury may take the whole matter into consideration and judge for themselves as to his qualifications.

Mr. COBB.—We except.

"Q. Now, let us assume that before this little piece broke out as I mentioned, it was a good wheel, and even at the time I am going to talk about a little later on, it was a good wheel, with the exception of that one break. Now, supposing that sheave-wheel being a good wheel that way, and is repaired that way, and is then set to work hoisting the weight I have described, and while so engaged the sheave-wheel breaks —the break beginning in the neighborhood of the rivet holes in one end of the piece used as a patch. It includes the patched piece and extends for about three feet along the perimeter of the wheel—that is, about three feet of the perimeter of the wheel falls or breaks out. In your opinion, to what is the breaking of that three feet of the perimeter of the wheel due?"

Mr. COBB.—We object to that on the ground that no such case is made by the evidence, and assuming a state of facts which do not exist, and further, that the

(Testimony of W. C. Angell.)

witness has not qualified himself to answer the question.

COURT.—I think that objection ought to be sustained.

Mr. JENNINGS.—We will take an exception. Now, Mr. Cobb, I will omit down to page six to the bottom of page five. I will mark it.

(Whereupon Mr. Jennings continued to read the remaining portion of J. B. Thomas' deposition, to which all objections were either overruled or withdrawn.)

Mr. JENNINGS.—I will now read the deposition of Bernard F. Hefele.

(Whereupon the deposition of Bernard F. Hefele was read, and all objections either overruled or withdrawn.)

Mr. JENNINGS.—I will now read the deposition of George B. Pillsbury.

(Whereupon the deposition of George B. Pillsbury was read, and all objections thereto either overruled or withdrawn.)

Said depositions were as follows:

Deposition of John B. Thomas.

The deposition of John B. Thomas was then read. Said deposition was as follows:

The said JOHN B. THOMAS, being first duly sworn, and being examined by R. W. Jennings, Esq., counsel for plaintiff, says:

Q. Please state your name.

A. John B. Thomas.

(Deposition of John B. Thomas.)

Q. How old are you?

A. 49 years the 22d of March coming.

Q. Where do you reside? A. Skagway.

Q. How long have you resided in Skagway?

A. I was four years here the 25th of last May.

Q. What has been your occupation or business since you commenced residing at Skagway?

A. Foreman and moulder in the railroad shops at Skagway.

Q. How long have you been a moulder?

A. In the neighborhood of about 31 years—something like that. Perhaps more.

Q. And since that time, as I understand it, you have been, in one capacity or another, a moulder of iron and metal?

A. Well, nearly all the time I was at my trade of moulder.

Q. And at the present time you are foreman of moulding at the shops at Skagway?

A. Yes, sir.

Q. Have you had experience making iron castings? A. Yes, sir, a great many.

Q. Have you ever made any cast-iron sheave-wheels? A. Quite a number.

Q. Could you give any estimate as to how many you have made in your lifetime?

A. Well, I could hardly say.

Q. Do you suppose you have made as many as one hundred?

A. Most assuredly—all the way from four inches up.

(Deposition of John B. Thomas.)

Q. In your business as moulder have you had occasion to study and observe the characteristics and peculiarities of iron that came within your scope as moulder?

A. We had to know that it was a good casting.

Q. I understand you have made numerous castings for sheave-wheels.

A. Well, I do not know how many you call numerous. I have made a good many. I do not know how many.

Q. You know something, then, of the relative strength of iron castings, do you not?

A. Well, do you mean after the casting is made?

Q. Yes. A. Well, to some extent, yes.

Q. Well, do you know the effect of repairs on castings—boring holes in cast iron and things like that?

A. Yes, I have had some experience—that is, I have seen the effects caused by such repairs.

Q. You would know what was a proper, or improper, or safe or unsafe way of repairing the flanges of a sheave-wheel?

A. Well, I have an idea how it should be done.

Q. I will ask you a question: A weight of 10,500 pounds is to be hoisted vertically about 750 feet. It is being done by means of a wire cable 1⅛ inches in diameter; the cable being attached to the weight passes up and over a sheave-wheel situated at the other end of this distance of 750 feet; thence it passes to a drum, around which it is wound by the action of the steam. The sheave-wheel is cast iron and is

(Deposition of John B. Thomas.)

about six feet in diameter, and the flanges of the sheave are in proper proportion. The wheel has six spokes. This sheave-wheel breaks in this way: A piece about 12 or 15 inches in length and 2 or 3 inches in depth breaks out of one of the flanges between the spokes—the break extending below the top of the cable lying in the groove. The break which I have described is repaired in the following way: A piece the size of the broken piece is laid back in the space broken out. A piece of iron is then placed on the outside of the broken flange, covering the break in depth and extending about four or five inches over each end. It is then riveted at each end of the piece put over—3 or 4 rivet holes at each end and being counter-sunk. In your opinion, is the sheave-wheel so broken, and so repaired, a fit and suitable piece of machinery for hoisting?

Mr. COBB.—I object; no such case is made by the evidence as is embraced in the hypothetical question put.

Overruled at the trial. Defendant excepts.

A. I should think not. No, not where there are any lives in danger; but otherwise if it was for some place else—but even then it is not a safe wheel. The wheel is weakened, for the simple reason that on these flanges the iron is harder—is chilled as it runs out to that light point, and there is not enough elongation. In other words, it is so brittle and hard there is no give, and in putting that patch on there and in drawing those rivets, as I understand the question,

(Deposition of John B. Thomas.)

it is more or less shrunk, no matter how correct the iron may be or how even you drill the hole. It has a tendency to draw, and with the rivets like that it has a tendency to buckle and throw that piece out again or break on one side or the other.

Q. Now, let us assume that before this little piece broke out as I mentioned, it was a good wheel, and even at the time I am going to talk about a little later on, it was a good wheel, with the exception of that one break. Now, supposing that sheave-wheel being a good wheel breaks that way and is repaired that way and is then set to work hoisting the weight I have described, and while so engaged the sheave-wheel breaks—the break beginning in the neighborhood of the rivet holes, in one end of the piece used as a patch. It includes the patched piece, and extends for about three feet along the perimeter of the wheel—that is, about three feet of the perimeter of the wheel falls or breaks out. In your opinion, to what is the breaking of that three feet of the perimeter of the wheel due?

Mr. COBB.—I object to the question because there is no such case made by the evidence which is assumed in the hypothetical question put, and because the witness has not shown himself qualified to give an opinion on that question; and because the question is incompetent, irrelevant and immaterial; at the trial this objection was sustained. Plaintiff excepted. Under order of the court the answer, which follows, was not read to the jury.

(Deposition of John B. Thomas.)

A. Well, it is due to just what I gave you a few minutes ago. In riveting that piece on the flange, as I have said before, the drawing of the rivets and binding them draws the iron, and it has to give in some place. The iron being hard it will not give. It is like a piece of glass.

Q. Would you ascribe the breaking of the wheel—the three feet of the wheel, to the way in which it had been patched?

Mr. COBB.—I object. Witness has not shown himself qualified to answer. Incompetent, irrelevant and immaterial. At the trial this objection was sustained. Plaintiff excepted. Under order of the Court the answer, which follows, was not read to the jury:

A. Why, certainly, it would cause the breaking of the wheel.

Q. Do you know of any way by which the wheel out of the flange of which a piece is broken as I have described—do you know of any proper way in which it could be repaired to make it safe to raise 10,500 pounds 750 feet?

A. Well, I think it would be a better way to bring the patch around both sides of the sheave, underneath, so it would fit any rivet on both sides of the flanges. Let that be one solid piece, forged by a smith, and brought up underneath there to fit so it will be perfectly close, and then rivet.

Q. And is that wheel is to be repaired at all, I understand that that is the proper way to repair it?

(Deposition of John B. Thomas.)

A. Well, I think it would be a more safe way, but still the break would weaken the wheel anyway, the minute it is drilled into.

Cross-examination.

(By Mr. COBB.)

Q. Have you had any experience with cast steel?

A. Some.

Q. Now, to change the hypothesis put in the question by Mr. Jennings, what would you say as to a cast-steel wheel?

A. Well, if it is cast-steel why undoubtedly it would stand a great deal more strain and lift a heavier load without breaking; and if it was made out of proper steel it would not break.

Q. Well, we will put the question in this way: It is a cast-steel wheel, made by one of the largest and most responsible manufacturers in the trade. The piece that broke out of it was about five inches in length and extended down to about the level of the top of the cable (which was a 1⅛ inch cable) as it lay in the groove. That piece was set back in there, where it fitted perfectly, just as it had been broken out. A piece of sheet steel, the width of the piece broken out, and forged to fit the curvature of the wheel, was put on over that on the outside and riveted into the flange of the wheel on each side. Now, would you say that that was the proper way or not to repair the wheel?

A. If that was a steel wheel, with the patch riveted of soft malleable cast-steel, it would be reasonably safe.

(Deposition of John B. Thomas.)

Q. Where would the strain upon a sheave-wheel come in hoisting vertically: Does it come upon the bottom of the groove or upon the flanges?

A. If pulling in a straight line it would come upon the groove, but if there is a lateral motion or a sway to the rope it would come upon the flanges.

Q. So if the weight to be hoisted is being brought up the shaft and the weight itself working in guides so as to keep it steady, as I understand it, there is no strain except in the bottom of the groove?

A. No, only in the bottom of the groove where the cable lies.

Q. Then if the weight to be hoisted was in the shaft which was supplied with guides, and the patch in the flange of the wheel did not extend below the top of the cable as it lay in the groove, there would be no strain on the flange?

A. A direct line across here. (Note: Reference is hereby made to sketch.) As I understand you, then, the patch is above the cable as it lies in the groove?

Mr. COBB.—Yes.

A. Then it has no tendency to effect the strength.

Q. Then, as I understand you, the patch would not affect the wheel at all?

A. Oh, yes, it would. It takes the strength out of the wheel. It is a strain along the flanges. If it is an iron wheel, to take a piece out of the flanges will weaken that wheel, which I would judge would not be safe when repaired, because it is liable to

(Deposition of John B. Thomas.)

crack at any time. I have seen lots of them in the scrap piles broken in that way and I can show you if you will come up to the shops. With a cast-steel wheel it would weaken it some but it would be more safe because there is give to steel.

Q. If this was a steel wheel and was broken and repaired in the manner put to you by me, would it be a reasonably safe wheel to use for the purpose of hoisting the weight stated? A. Yes.

Q. The wheel in question was a six-foot sheave-wheel, drawn to scale on Defendant's Exhibit No. 1, which is now before you here. I will ask if you have had sufficient experience as a machinist and mechanic to know what weight it would bear?

A. I am not a machinist, and I do not know.

Redirect Examination.

(By Mr. JENNINGS.)

Q. In the case I have mentioned to you the cable passes over the sheave onto a drum about six feet in length, and is wound around that drum. Would that give any lateral strain to the flanges—we will assume that it is 75 feet from the drum?

A. Why, certainly. It would certainly have a tendency to affect the weight on the flanges of the wheel—the more the sway was the more the strain would be on the flange, and the weight itself will give it a start when the engine moves and sometimes cause the rope to fly up. It sways so I have seen it strike the shaft. I was on the cage myself at the time.

(NOTE.)

Defendant's Identification No. 1 referred to in the foregoing deposition and submitted to witness therein named is the same as Defendant's Exhibit "C."

The deposition of Bernard F. Hefele was then read. Said deposition was as follows:

[Deposition of Bernard F. Hefele.]

The said BERNARD F. HEFELE, being first duly sworn, and being examined by R. W. Jennings, Esq., counsel for plaintiff, says:

Q. You say your name is Bernard F. Hefele?

A. Yes, sir.

Q. What is your age? A. 46 years.

Q. Where is your residence?

A. 11th and Broadway, Skagway, Alaska.

Q. What is your occupation?

A. Machinist.

Q. By whom are you at present employed?

A. The White Pass & Yukon Route.

Q. How long have you been employed by them?

A. It will be six years next February.

Q. In what capacity have you been employed?

A. I am a machinist in the machine-shops.

Q. How long have you been a machinist?

A. Since 1876.

Q. Where did you work as a machinist before entering the employ of the railroad?

A. I worked in Moran Brothers machine-shops, Seattle.

Q. How long?

A. Well, I think a little over a year.

(Deposition of Bernard F. Hefele.)

Q. Where did you work before then?

A. Back east,—in New York City, for Cameron Steam Pump Works.

Q. How long did you work for them?

A. About a year and a half.

Q. Where did you work before going with them?

A. Before that I worked in Europe.

Q. In the machinery business?

A. Yes, sir.

Q. State whether or not the persons you have been employed by have been engaged in the business of manufacturing hoisting machinery?

A. Yes, sir.

Q. Who were they?

A. George Sigal & Co., Vienna, Austria.

Q. State whether or not the firm you have just mentioned as being in New York, were engaged in that business also. A. No, sir.

Q. State whether or not Moran Brothers made hoisting machinery. A. Yes, sir.

Q. State whether or not you yourself have ever been engaged assisting in the manufacture of hoisting machinery.

A. I have been,—when I was working for Geo. Sigal.

Q. Were you employed at any time working on hoisting machinery while working for Moran Brothers? A. Only a little,—on repair work.

Q. Did you ever construct or help construct sheave-wheels?

(Deposition of Bernard F. Hefele.)

A. Well, I worked on the lathe on some of them, and worked on the different parts.

Q. Are you familiar with the process or method of hoisting weights by means of a wire cable, running over a sheave-wheel and from there to a drum?

A. Yes,—we have one right in the shops.

Q. Have you had experience in such operations, —hoisting and such things? A. Yes, sir.

Q. State whether or not the conducting of such operations has been more or less a part of your duties and experience since you have become a machinist.

Objected to by counsel for defendant, because of leading question.

Overruled.

A. Well, I was not designated especially for that line, but you know in repair work a lot of that kind of work comes in and we have to do it. I am an all-around man and can repair any kind of machinery.

Q. State, if you know, what would or would not be a suitable, fit or proper sheave-wheel to be used in the hoisting of a weight say of 10,500 pounds.

A. Yes, sir.

Q. Now, I will ask you this question. A weight of about 10,500 pounds is to be hoisted vertically about 750 feet. It is being done by means of a wire cable 1-⅛th inches in diameter. The cable being attached to the weight then passes up and over a sheave-wheel situated at the other end of this distance of 750 feet; thence it passes to a drum, around which it is wound by the action of steam. The sheave-wheel

(Deposition of Bernard F. Hefele.)

is cast iron and is about six feet in diameter, and the flanges of the sheave are in proper proportions. The wheel has six spokes. This sheave-wheel while so engaged in hoisting as aforesaid, breaks in this way: A piece about 12 or 15 inches in length and 2 or 3 inches in depth breaks out of one of the flanges between the spokes,—the break extending below the top of the cable lying in the groove of the wheel. State whether or not in your opinion that sheave-wheel so broken is a fit or proper in instrumentality to be used in the lifting of such weight?

Objected to by counsel for defense because there is nothing in the evidence in the case upon which to base such a hypothetical question; and because the facts regarding the condition of the wheel at the time it was used are not stated; and because witness has not shown himself qualified to express an opinion, it not being shown that he was ever engaged in the operation of such machinery, or had seen it operated to an extent to enable him to form an opinion as an expert.

Overruled at the trial—exception to defendant.

A. No, sir, it is not.

Q. Have you ever seen weights being hoisted by means of cables and sheave-wheels?

Same objection as above.

A. Yes, and if the wheel is broken it is not fit to do any lifting. Anyway, those sheaves are not so constructed that they can be very well repaired.

Q. Is it a safe instrumentality to be used for such purpose?

(Deposition of Bernard F. Hefele.)

Counsel for defendant objects on grounds that witness has not shown himself qualified to answer.

Overruled.

A. No, not in the broken state.

Q. Please state how, if at all, such break increases the risk in using the wheel.

Mr. COBB.—I object because witness has not shown himself qualified to answer.

Overruled at trial—exception to defendant.

Q. States how that increases the risk,—what is liable to happen?

A. The cable is liable to slip off.

Q. Liable to slip through that broken piece?

A. Yes, sir.

Q. Now, I will ask you this question: The broken wheel I have just mentioned is repaired in this way: A piece the size of the broken piece is laid back in the space broken out; a piece of iron is then placed on the outside of the broken flange, covering the break in depth and extending about four or five inches over each end of the break. It is then riveted at each end of the piece put over. Three or four rivet holes at each end,—the rivets extending clear through one flange and being counter-sunk. In your opinion is a sheave-wheel so broken, and so repaired, a fit and suitable piece of machinery to be used for hoisting such weight?

Mr. COBB.—We object to the hypothetical question on the grounds that witness has not shown myself qualified to express an opinion.

Overruled at the trial—defendant excepts.

(Deposition of Bernard F. Hefele.)

A. Well, it is a very dangerous thing to do—I would say no.

Q. If you say it is not fit or suitable, why not? Explain what is liable to happen to the wheel if repaired in that way.

By Mr. COBB.—Same objection as above. Same ruling—exception to defendant.

A. The strain of the cable will come right on that flange—I mean that piece of iron that is fit on the flange instead of the broken piece, and it would just work on the rivets alone. The flanges are not very heavy, anyway, on these wheels. To repair that properly it would be necessary to fit a piece of iron around the sheave so that it will grip the other side of the wheel and have a chance to brace itself against the flange and thereby resist the strain. Let the patch go clear around the bottom part of the sheave part of the wheel, and rivet it, on the other side through the flange.

Q. Then what would you say as to whether or not a wheel would be safe if repaired in the way I have stated to you—would it be safe or would it not?

A. It is a risky thing, because it is liable to break again any minute.

Q. What is liable to happen to the cable if the wheel does break?

A. Well, the cable would naturally slip off and slip down on the axle of the sheave, and with a weight attached to it like, with a quick jerk, is liable to snap it right off. It would be apt to catch on the edge of

(Deposition of Bernard F. Hefele.)

the flange and then the weight coming down with about three feet of a fall it would be liable to snap the cable right off.

Q. Could a sheave-wheel so broken as I have described be repaired at all so as to make it a fit, proper and safe instrumentality to be used for the purpose aforesaid, and if so, how?

Mr. COBB.—We object, as witness has not shown himself qualified to answer.

Overruled at trial—exception to defendant.

A. Well, I stated before how this could be repaired.

Q. Well, if it was repaired in the way you have mentioned would it be as good a wheel as a new wheel?

A. Well, the way I said to repair it it would be almost as good, but of course the patch weakened it. It would answer the purpose for the time being, but as soon as a new wheel could be procured it should be exchanged.

Q. A sheave-wheel so broken and so repaired as I have described to you is set to work hoisting a weight of 10,500 pounds, as I have described, and while so engaged it breaks—the break begins in the immediate neighborhood of the rivet holes in one end of the piece used as a patch. It includes the patched piece and extends for about three feet of the entire perimeter of the wheel—that is, about three feet of the perimeter of the wheel brakes out and falls. We will assume that it was a good wheel, free from latent

(Deposition of Bernard F. Hefele.)

defects to start with and before it first broke as I have described. In your opinion what caused the subsequent breaking of that wheel—that is the breaking of the three feet out of the perimeter. Beginning at the patched piece it started to break on one end of the patch and took off the entire piece.

By Mr. COBB.—We object to the question because the hypothesis is not supported by any proper evidence, and further, the witness has not shown himself qualified to give an opinion.

A. If that is so there is no doubt it was on account of the patch not being put on in the right way.

Overruled.

Q. Now, Mr. Hefele, objection has been made to your testifying to those things that you have testified to because you have not shown yourself competent. I will ask if in your experience and observation as a machinist and a man who has worked on hoisting machinery and observed the operation and the effects on hoisting machinery, whether or not your experience and observation in that line has enabled you to testify as you have testified.

A. Well, I have testified to my best knowledge and experience. I am a good, all-around man and have worked on all kinds of machinery. I have handled hoisting machinery just as well. I would not be here to swear to something that is not so. I am a man of honor, and if you say I am not qualified I will just take that as an insult. I am a gentleman. I always will be.

(Deposition of Bernard F. Hefele.)

Q. Mr. Hefele, I understood you to say that you had been around hoisting machinery while it was in operation and understand how it is conducted.

A. Yes, sir.

Cross-examination.

(By Mr. COBB.)

Q. You say your experience in working on hoisting machinery was obtained with Sigal & Co. of Vienna—how long did you work with them?

A. About three years.

Q. When was that?

A. In 1878, 1879 and 1880.

Q. In what capacity were you working?

A. Machinist.

Q. What position did you hold in the works?

A. Machinist.

Q,. Were you a foreman or superintendent ?

A. No; just mechanic.

Q. As I understand it, you have not worked in any factory where hoisting machinery has been built since then?

A. Not in a factory where they made a specialty of that kind of work.

Q. You have been asked, and have testified, in regard to a cast-iron wheel. Have you had any experience with cast steel? A. Yes, sir.

Q. Cast steel at the time you worked there was not used?

A. No, sir; there was no such thing as that, but I know all about cast steel.

(Deposition of Bernard F. Hefele.)

Q. Now, you stated in answer to a hypothetical question in reference to the proper repair of this wheel that as soon as the piece broken out of the flange was broken out clear to the bottom, it would cause it to drop. Do I understand you mean clear to the bottom of the groove? A. Yes, sir.

Q. And your statement was based upon that hypothesis? A. Yes, sir.

Q. Now, Mr. Hefele, take this sort of case: That instead of the piece broken out of the flange—that this wheel in the first place was cast steel, and that instead of the piece being broken out to the bottom of the groove, it was only broken out to a point on the flange to the top of the 1-1/8th inch cable that worked in it, and instead of 12 or 15 inches long it was only three to five inches long—if that was the case, what would you say—would it apply or not?

A. Well, if that wheel is cast steel it is about 100 per cent improvement, and there is not so much danger, as you can rivet cast steel very good without breaking; and the length of the piece broken out does not matter, because whenever the cable catches the wheel and winds on the drum, why as soon as there is a breakage of the flange it is liable to slip the cable in there. You see, if it was going in a straight line it would not be so apt to, but if pulling sidewise or on an incline, it would be liable to slip the cable off. If I had something I could show you how, with a sketch.

Q. Now, then, you said a moment ago that you could testify better if you had a sketch of this wheel.

(Deposition of Bernard F. Hefele.)

I will exhibit to you here a sketch of the wheel, and ask the stenographer to mark it "Exhibit No. 1."

By Mr. COBB.—Now, I will offer this in evidence in connection with the cross-examination, and ask that it be attached as a part of it.

(By Mr. COBB.)

Q. Now, we will assume for the purpose of the questions regarding this wheel that the sketch is drawn to scale and the correct dimensions are shown by the figures upon it. Now, assuming that this is a cast-steel wheel, six feet in diameter, and that the method of its operation is for a perpendicular lift out of a shaft, the cable running directly over this sheave-wheel and thence to the drum 200 feet away, upon which it winds; and we will further assume that a piece is broken out of the flange of the wheel, patched out, to a depth of about 1 1/8 inches from the bottom of the groove, so that up to the level of the rope as it lies in the groove, the flange is intact and not broken and that the piece patched out is about five inches in length. That piece is set back into the flange, where it accurately fits, and a piece of sheet steel, extending about 18 inches on each side of the broken piece, is put on the outside of the flange and riveted there; and the piece patched out is also riveted on to it. I will ask if that would be the proper way to repair that wheel. I will further add that the piece of sheet steel extends about nine inches on each side of the patched piece and the rivets are of proper size and put in by competent mechanics and the whole thing firmly riveted in there?

(Deposition of Bernard F. Hefele.)

A. Well, if the sheave is cast steel it can be properly repaired in the above said way, as I have stated.

Q. Now, assuming that the drum upon which the cable is wound is situated 200 feet distant from the sheave-wheel, what, if any, would be the strain upon the flanges.

A. If the drum is two hundred feet away from the shaft the strain cannot really be very great—especially to fit the plate.

Q. Now, Hefele, you have examined this drawing here,—Defendant's Exhibit No. 1. Have you sufficient experience to give an opinion as to the weight that a wheel of those dimensions could be reasonably calculated to bear?

A. Well, that wheel, constructed out of cast steel, will bear a weight of five tons attached to the cable.

Q. Do you mean when it is repaired as I have stated before? A. Yes, sir.

Q. Now, I will ask you this question: Would a patch upon the wheel such as described to you in the question put by Mr. Jennings have any effect or tendency to cause a break in any other part of the wheel? A. No, not necessarily.

Redirect Examination.

(By Mr. JENNINGS.)

Q. Mr. Hefele, when I asked you the question about the flange being broken below the top of the cable, you answered that such a sheave so broken was an unfit instrumentality to be used in the lifting of such weight. Now, Cobb put a question to you as-

(Deposition of Bernard F. Hefele.)

suming that it was broken clear to the bottom of the groove. I will ask you again if it was broken below the top of the cable, and repaired as you have suggested, would your answer be the same as you gave him?

A. No, sir. If it breaks below the top of the cable and above the bottom of the groove, it is not safe. If she breaks in the bottom of the groove it is not safe, but if breaks above the cable so that the cable can bear on the sound part of the groove, then it is safe, if it is above the cable and repaired in the way I have said.

(NOTE.)

Defendant's Identification No. 1 referred to in the foregoing deposition and submitted to witness therein named is the same as Defendant's Exhibit "C."

Deposition of George B. Pillsbury.

The deposition of Lieutenant George B. Pillsbury was then read. Said deposition was as follows:

The said Lieutenant GEORGE B. PILLSBURY, being first duly sworn, and being examined by R. W. Jennings, Esq., counsel for plaintiff, says:

Q. Please state your name, age, residence, occupation or profession.

A. My name is George B. Pillsbury. My age is 28 years. Immediate residence, Skagway. Occupation, officer of the Engineer Corps, United States Army.

Q. What is your present occupation?

(Deposition of Lieutenant George B. Pillsbury.)

A. I am engineer officer of the Alaska Road Commission.

Q. Are you a graduate of West Point?

A. I am.

Q. You are a graduate of West Point and assigned to the Engineer Corps? A. Yes, sir.

Q. State generally the nature of the subject of the studies and the course of preparation you had to undergo, both at college and in actual experience, in order to fit yourself as Engineer Officer.

A. My course was mostly mathematical.

Q. Did you have occasion to investigate and inform yourself upon the breaking strength and the safe strength of materials?

A. That is part of the course at West Point, yes.

Q. Improvement of rivers, harbors and building of bridges, hoisting of loads and things of that nature came within the scope of your studies and duties at times? A. Yes, sir.

Q. Are you able to state what is meant by quiescent load or dead load? A. Yes, sir.

Q. Please state what it is.

A. Well, it is a load that is resting quietly upon its support.

Q. Are you able to state what a live load or suddenly applied load is? A. Yes, sir.

Q. Please state what it is.

A. It is a load suddenly applied to its support.

Q. What relation bear to a quiescent load, in speaking of the strength of materials?

(Deposition of Lieutenant George B. Pillsbury.)

A. Taken as about two to one.

Q. Just explain more fully.

A. A live load exerts twice the force on a structure that a dead load does.

Q. Which exerts the most force, a live load or a dead load? A. A live load.

A. Well, a load suddenly applied to a structure exerts twice the strain on that structure as the load itself, after it has come to a rest?

Q. Are you able to state what is meant by the breaking strength of materials? A. Yes, sir.

Q. Please state what it is.

A. The force required to break them.

Q. Are you able to state what is meant by the safe strength of materials? A. Yes, sir.

Q. Please state what it is.

A. It is a force which is considered safe to subject them to.

Q. Then, am I to understand that anything over the safe strength of materials might break the materials?

A. A structure is usally designed so as to stand four or five times the strain that it would probably be subjected to.

Q. By a safe load you mean a load that it would be safe to apply? A. Yes, sir.

Q. Do you know what is the safe strength and the breaking strength of a plow-steel cable 1⅛ inches in diameter, with 19 wires to the strand?

Objected to by counsel for defense on the grounds that witness has not yet shown himself qualified by

(Deposition of Lieutenant George B. Pillsbury.)

actual experience in the use of such materials or of such a rope to give an opinion.

Overruled at the trial—exception to defendant.

A. The breaking strength and the safe strength of such a cable is laid down in books of authority on engineering subjects, and gives the strength in a tabulated form.

Q. Will it be necessary for you to refer to some book of authority on the question?

A. Yes, sir.

Q. Well, I hand you a book called "The Mechanical Engineer's Pocket-book and Reference Book of the rules, dates and formula for the use of Engineers, Mechanics and Students. By Wm. Kent A. M., M. E. Consulting Engineer, Member of American Society of Mechanical Engineers and American Institute of Mining Engineers, published by John Wiley & Sons, London. I will ask you to take that book and find the breaking and safe strength of plow-steel cables. Do you find such a table?

A. Yes, sir—on page No. 228.

Q. Is that table accepted and generally recognized as authority, and is it a statement that engineers go by?

A. Yes, sir, it is a standard table.

Q. You may state what that table on that page gives as the breaking strength and the safe strength of such cable.

Objected to by counsel for defendant on the grounds that the table itself is the best evidence.

Overruled at the trial—exception to defendant.

(Deposition of Lieutenant George B. Pillsbury.)

Q. Referring to that table, state what is the breaking strength and the safe strength of such a cable.

Objected to by counsel for defendant on the grounds that the book itself is the best evidence.

A. The tabulated value of the breaking strength per ton of 2000 pounds is sixty tons.

Q. What is the safe strength?

A. It gives a proper working load of twelve tons.

Q. I understood you to say that the table you have just referred to is a standard table of the safe and breaking strength of cables. Would it be accepted as such? A. Yes, sir.

Q. A weight of ten thousand pounds is attached to one end of such a wire cable as I have described and passes over a sheave-wheel six feet in diameter and while the weight is being hoisted the sheave breaks, letting the cable down to the axle of the sheave, a distance of 2½ feet. What effect would the breaking of the sheave have on the cable—the distance from the top of the sheave to the weight being not less than sixty feet?

Objected to by counsel for defense on the grounds that witness is not qualified to answer, and because there is nothing shown in the evidence indicating such conditions as put in the hypothetical question.

Overruled at the trial—exception to defendant.

A. Strictly as a mathematical problem, and presupposing that the rope is not strained beyond its elastic limit, we find that the strain developed would be dangerous.

(Deposition of Lieutenant George B. Pillsbury.)

Q. Do you mean by that that it might break the cable? A. Yes, sir.

Q. Now, you say pre-supposing that the cable is not strained beyond its elastic limit. Suppose it was a new cable of the dimensions I have mentioned to you, and had attached to it the weight I have mentioned—that is, suppose there was nothing the matter with the cable to start with?

A. My answer would be the same.

Cross-examination.

(By Mr. COBB, Counsel for Defendant.)

Q. Lieutenant, have you ever had any experience in actually operating machinery for the hoisting of weights with plow-steel cables? A. No, sir.

Q. Your whole knowledge of the subject is merely gained from the studies of it in the course of your education? A. Yes, sir.

Q. And your answers are based upon the mathematical formulas developed in the studies laid down?

A. Yes, sir.

Q. Now, counsel has asked you a hypothetical question based upon the breaking of the sheave-wheel and the drop of the rope passing over the sheave-wheel being 2½ feet and the distance from the top being not less than sixty feet. Was your answer based upon that hypothesis?

A. Yes, sir.

Q. I will ask you if in the case in which your testimony is being taken there was a new plow-steel cable of the diameter of 1⅛ inches used, and the

(Deposition of Lieutenant George B. Pillsbury.)

sheave-wheel that broke was six feet in diameter from the center of the rope as it passed over the sheave to the center of the rope as it would lie in a groove on the opposite side, making it for all practical purposes what is known as a six-foot sheave-wheel, a piece should break out of the perimeter in the sheave-wheel, allowing the rope, with the weight attached to it, to drop down to the axle of the wheel, a distance of three feet; now, upon that hypothesis I will ask you what would be the breaking strength of the rope?

A. It would depend entirely upon the length of the rope.

Q. Well, say the load was about 35 to 50 feet below the sheave-wheel and the rope with the weight attached to the end of it dropped from the perimeter of the sheave-wheel to the axle, a distance of three feet; what would be the breaking force exerted?

A. There is a formula that can be applied to such a case for the purpose of finding the strain upon the rope. This formula being based upon the hypothesis that the rope is not strained beyond its elastic limit.

Q. Could you give us the strain exerted?

A. It could be figured out on that hypothesis.

Q. Could you figure it out? A. Yes, sir.

Q. I will give you the factors that enter the problem: The weight upon the rope, including the load in the skip and the skip itself was five tons, also that part of the rope, the weight of which would rest upon

(Deposition of Lieutenant George B. Pillsbury.)

the point where the strain came. What would the strain be with a drop of three feet and a length of 30 feet?

A. It would give a force of 93 tons, under the supposition that the elastic limit is over 93 tons; but the point of elastic limit is considerably under this, so that the formula does not strictly apply. The results obtained merely show that this strain would be extremely dangerous and might break the rope with a drop of three feet and a length of thirty feet.

Q. Lieutenant, from your knowledge, that is, technical knowledge, of the matters inquired about, state whether or not you would consider a load of five tons—a maximum load of five tons, a safe working load to be hoisted upon a 1⅛th inch plow-steel cable. A. Yes, sir.

Q. In answer to the question before last, Lieutenant, you stated that the strain obtained by the formula you used was about 93 tons?

A. Yes, sir.

Q. I will ask you if that data is at all reliable without knowing the elasticity of the rope?

A. Well, the greatest possible range of the modulus of elasticity would not affect the results to any great extent; but it must not be understood that I am giving these results as precisely reliable. They depend upon a number of different consonants, the value of which varies and could not be determined from the rope in question without making an actual test of the rope.

(Deposition of Lieutenant George B. Pillsbury.)

Redirect Examination.

(By Mr. JENNINGS.)

Q. I understood you to say in answer to Mr. Cobb's question, that you never had any actual experience in hoisting with plow-steel rope.

A. No, sir.

Q. Well, I will ask you if your education, and the course of studies you had to undergo to fit yourself for Engineer Officer embraces the subjects and matters about which you have testified?

A. As far as I have testified, yes.

Q. Do you consider yourself competent to testify knowingly as far as you have?

A. As far as I have testified.

Q. Please give the name of some other author besides Kent, and the title of some other work by scientific men upon matters of this kind.

A. Rankine and Trautwine.

Cross-examination.

(By Mr. COBB.)

Q. Lieutenant, you said a while ago, in reply to a hypothetical question I put, that the strain exerted upon a rope on a drop of three feet with a five-ton weight upon it, would be about 93 tons. Now, I will ask you if we understand by that that the breaking strain upon any one point of the rope would be that weight?

A. It would be practically the same at all points on the rope.

Q. Do I understand by that that you mean it would require a rope, under the conditions put, to

(Deposition of Lieutenant George B. Pillsbury.)

sustain a three-foot fall, with five tons weight, of the same strength as it would to sustain a weight of 93 tons? A. Yes, sir.

Q. Now, you have figured this out here in the office and I will ask if you are sure that your figuring on this weight is absolutely correct.

A. No, sir.

Q. Then I will ask you to go through your formula again and give it to the stenographer, and see if you have not made an error and got the straining point much too great.

Q. Lieutenant, I will now ask you this problem: There was a weight of five tons being hoisted by means of a 1⅛th inch plow-steel cable. The cable had a total length of nine hundred feet. The weight being hoisted is attached to the end of the rope which runs over a six-foot sheave-wheel, and thence two hundred feet, where it is wound around a drum operated by an engine for the purpose of hoisting and lowering. When the skip as it was being hoisted had reached a point fifty feet below the sheave-wheel, the sheave-wheel broke and allowed the rope to fall a distance of three feet, where it was caught on the axle of the sheave-wheel. Under those conditions, can you figure out the amount of strain that would be exerted upon the rope?

Q. Adding this to the question—the drum was free.

Same objection by counsel for plaintiff.

(Deposition of Lieutenant George B. Pillsbury.)

A. If the drum was free the data given is not sufficient to make one form any idea of the strain brought on the rope.

Q. You mean to be understood to say that if those conditions actually existed, the calculations you have made in regard to the 93 tons would have no application whatever?

A. No application whatever. That was based upon the weight on a rope that was 35 feet long.

(By Counsel for Plaintiff.)

Q. What do you mean by a "free drum"?

A. Well, I presume that is a drum that is free to rotate.

Lieutenant GEORGE B. PILLSBURY being recalled for further redirect examination, and all parties being present, was asked the following question:

Q. At your examination a few hours ago Mr. Cobb asked you to make a calculation as to what would be the strain upon a wire cable under certain circumstances, and you gave as your reply that it would be equal to a weight of 93 tons. Mr. Cobb then coupled his question with the supposition that the wire rope was wound around a free drum. I then asked you, on redirect examination, what you meant by a free drum, and you replied, "a drum free to rotate." I will now ask you if a drum that was engaged in hoisting was rotating in the opposite direction from the falling object, would you call that a free drum?

A. No, I should not consider that a free drum; but the fact that a longer length of cable was attached

(Deposition of Lieutenant George B. Pillsbury.)

to the falling weight on the further side of the pulley entirely changes the aspect of the problem set before me by Mr. Cobb.

Q. Suppose the drum was situated about 75 feet from the sheave, and below the sheave at an angle of about 45 degrees, would that make any material difference in your calculation?

A. Yes, a very material difference.

Q. Would not the fact that the drum was rotating in the opposite direction from the falling weight cause the sudden strain to be greater than it would if the rope were attached to a stationary object?

A. If the distance from the sheave to the weight were but 35 feet, as measured by the cable, and if the drum were rotating in a contrary direction, it would certainly increase the strain; but if the drum was located a considerable distance from the weight, even if it were rotating at any normal speed in a contrary direction the strain on the rope would be less.

Q. Now, you gave the calculation of 93 tons under the hypothesis that Mr. Cobb presented to you?

A. Yes, sir.

Q. And you would say now that if the drum were situated below the sheave-wheel, at an angle of about 45 degrees, and about 75 to 100 feet distant, it would make a material difference in your calculation?

A. Yes, sir.

Q. Could you give an idea as to how much it would reduce the calculation?

A. In the formulae it is a little complex and it would be difficult to say.

(Deposition of Lieutenant George B. Pillsbury.)

Q. Then, I understand that if the facts were as I have stated,—or if the drum were, as a matter of fact, rotating in an opposite direction to that of the falling weight, and was not what you call a free drum, your answer to Mr. Cobb's question in regard to the strain on the rope, would not be correct?

A. No, sir.

(By Mr. COBB.)

Q. Would the strain be greater or less?

A. It would be less.

(By Mr. JENNINGS.)

Q. But how much less you could not state?

A. No, sir.

[Testimony of P. S. Martina.]

P. S. MARTINA, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. JENNINGS.)

Q. Please state your name?

A. P. S. Martina.

Q. Where do you live? A. Douglas Island.

Q. Where are you working?

A. Perseverance mine.

Q. The Perseverance mine? A. Yes, sir.

Q. What is your business or occupation?

A. Miner.

Q. How long have you been a miner?

A. About eighteen years, I guess.

Q. Where have you worked?

(Testimony of P. S. Martina.)

A. Why, I have ben working here and around in the States.

Q. What States have you worked in?

A. Oregon, Colorado, down in Washington, and up here in Alaska, Michigan.

Q. When you worked in the mines in Michigan, did you have any experience working in quartz mines where they had shafts?

A. In Michigan pretty near all shafts—all iron mines.

Q. What kind—vertical or incline?

A. Straight down shafts.

Q. Did you say you worked in that kind of a mine in Michigan? A. Yes, sir.

Q. How many mines of that kind did you work in there?

A. Worked in three different shafts in Michigan.

Q. Did you ever have any experience in sinking shafts?

A. Yes, I have done some sinking.

Q. You have worked at sinking shafts?

A. Yes, sir,

Q. That is, as a miner.

A. Yes, sir; running a machine.

Q. Have you ever been a contractor?

A. Not of company work.

Q. Did you ever have a contract for sinking?

A. No.

Q. Not in Michigan? A. No.

Q. Did you in any other place? A. No.

(Testimony of P. S. Martina.)

Q. You say you have worked in sinking shafts?

A. Yes, sir.

Q. Did you work in Colorado sinking a shaft?

A. Yes, sir; three months.

Q. Where? A. Ora City.

Q. In Pennsylvania? A. Coal mine.

Q. Gold mining? A. Coal mining.

Q. They did not have vertical shafts in those mines? A. No; sloping incline shaft.

Q. You say you were working in Washington?

A. Yes, in the gold mines.

Q. After you worked in Washington you worked up here?

Mr. COBB.—Objected to as leading.

COURT.—Objection sustained.

Q. How many years have you lived up here and worked as a miner?

A. I came up here in 1898.

Q. Since 1898?

A. Yes; I went down below three or four times in the winter.

Q. Now, in your experience in sinking shafts, did you—or do you know anything about the use of bulkheads in those kinds of shafts?

A. They use bulkheads all right.

Q. What kind of bulkheads do they use where they work at the bottom of a shaft and hoisting is going on over head?

Mr. COBB.—We object to that as immaterial.

(Testimony of P. S. Martina.)

COURT.—Objection sustained. I think the evidence ought to be confined to the bulkheads in this mine and not what they are using somewhere else.

Mr. JENNINGS,—Very well.

Q. Now, Mr. Martina, I will ask you what is your opinion as to whether the bulkhead which I will describe to you is safe or not based upon your experience as a miner as you have stated. The shaft of the mine is over eight hundred feet in depth and ore is being hoisted from above—from the 750-foot level in an ore skip which has the ordinary clutch on it. There are runners on the skip and guides for the runners to run in running all the way down from the top to the bottom of the shaft. Men are at work at the bottom of the shaft with drilling machines directly under where this ore is being hoisted. The only bulkhead is at the 750-foot level consisting of three timbers 12x12 made of Alaska spruce placed at an angle across the shaft with the ends placed in hitches in the wall and placed at an angle of forty-five degrees and a further platform, an additional platform, underneath that about sixty feet beneath the bulkhead—there is no rock or anything else placed on the bulkhead, nothing except the bare timbers. Would you consider that a safe bulkhead for men to work under under those circumstances?

Mr. COBB.—We object to the witness answering that question. The witness has not yet shown that he has any qualifications. It is not shown that he had anything to do with maintaining bulkheads. A

(Testimony of P. S. Martina.)

man may work for twenty years in a mine in a shaft and still never know anything about a bulkhead.

COURT.—I think the objection must be sustained. Counsel may have misunderstood me. Counsel may show his qualifications—his knowledge—how many he has seen and if he has built any—worked under them or around them, and what information he has concerning them. The Court did not mean to rule out your evidence in relation to his qualifications. The Court will permit you to examine him for that purpose.

Q. I will ask you if you in your experience have ever observed the bulkheads that were used in the places where you worked in those mines?

A. Yes, sir, I have.

Q. What kind of bulkheads have you seen used?

A. Center bulkheads.

Q. A V-shaped bulkhead?

A. You might call it that.

Q. What other kinds of bulkheads—what, if anything, was on top of the timbers?

A. Four or five feet of rock left on top of the bulkhead.

Q. How are the timbers set in the shaft in the bulkhead that you have described?

A. I don't quite understand you.

Q. You don't understand—are they laid flat or standing up—the center bulkheads?

A. Standing up.

Q. Where are the lower ends of the timbers?

(Testimony of P. S. Martina.)

A. In the rock.

Q. In the solid rock? A. Yes, sir.

Q. What did you say they placed on top of the timbers? A. Four or five feet of dirt or rock.

Q. How many set of timbers?

A. About one set five feet apart—about five feet apart.

Q. You said they put about five feet of rock on top; how do you mean?

A. The timbers are set up this way and then they put four or five feet of rock on top of that.

Q. On top of what?

A. On top of those timbers.

Q. Have you had any experience in building that kind of bulkhead?

A. I never built any kind of bulkhead like that—I have seen them built.

Q. You have seen them used and seen them built?

A. Yes, sir.

Q. What other kind of bulkhead have you ever seen? A. I have never seen any other kind.

Q. Did you say anything about a solid pillar bulkhead?

A. No, I did not say anything about that.

Q. In the mine in Michigan in which you worked that was the kind they used?

Mr. COBB.—We object to that as immaterial.

COURT.—Overruled. It is only for the purpose of showing his qualifications.

Q. In your work in the shafts in the Michigan mine while working in there is that where you saw

(Testimony of P. S. Martina.)

these bulkheads which you have described—this V-shaped or center bulkhead? A. Yes, sir.

Q. Were there two kinds, some double and some single timbers?

Mr. COBB.—Objected to as leading.

COURT.—Overruled.

A. No, sir; single timbers.

Q. Did you have any experience in bulkheads in Colorado? A. No, sir.

Q. No other place except in Michigan?

A. No.

Q. How many years did you work in Michigan?

A. Five years.

Q. Work at mining all the time?

A. Most of the time.

Q. You have been a miner for eighteen years?

A. Yes, sir.

Q. Have you ever seen the bulkhead over at the Treadwell—have you seen the bulkhead they have in the shaft at Treadwell?

A. The one over here?

Q. Yes.

A. I did not see that one—there is a new one now.

Q. Have you seen the bulkheads at the Treadwell mines? A. I have seen one.

Q. When did you see that?

A. About six months ago.

Q. What kind of a bulkhead is that?

Mr. COBB.—Objected to as incompetent, irrelevant and immaterial.

(Testimony of P. S. Martina.)

Mr. JENNINGS.—I want to show that the kind they are using now is not the same as they used at that time.

COURT.—I think the objection ought to be sustained.

Q. I will renew the question I asked you a while ago and ask you if you would be willing to work under a bulkhead of that character?

Mr. COBB.—We object to that.

COURT.—I think the objection ought to be sustained.

Q. You were subpoenaed by the marshal from the Perseverance mine? A. Yes, sir.

That is all.

[Testimony of W. C. Angell.]

W. C. ANGELL, a witness heretofore called on behalf of the plaintiff and having been heretofore duly sworn, resumed the stand and testified as follows:

Direct Examination.

(By Mr. JENNINGS.)

Q. I believe you stated that your residence was in Skagway? A. Yes, sir.

Q. You are a machinist? A. Yes, sir.

Q. Did you state how long you had been a machinist? A. Eighteen years.

Q. Where have you worked?

A. I served my apprenticeship in the Golden State & Miners' Iron Works in San Francisco.

(Testimony of W. C. Angell.)

Q. During those four years state what you did in the way of working about mining machinery and other machinery?

A. Mining machinery in general—of course they manufactured other machinery.

Q. Did you work in and about mining machinery while there? A. Yes, sir, I did.

Q. After you had been there four years what did you do?

A. I continued there two years more as a journeyman machinist.

Q. During that time did you do general work on mining machinery? A. Yes, sir.

Q. Did you work on or about mining machines—different parts of mining machinery?

A. Yes, sir.

Q. After you left the Golden State & Miners' Iron Works at the end of those two years where did you go?

A. The Appolo Mine at Unga Island, Alaska.

Q. What did you do there—in what capacity did you work? A. I was there as a machinist.

Q. How long was you employed there?

A. From 1892 to 1897.

Q. What was the nature of your duties while there?

A. Machinist in charge of the machinery part of the time; part of the time assistant with another man—two of us.

Q. State what kind of a mine that was?

(Testimony of W. C. Angell.)

A. Quartz gold mine.

Q. It was a quartz gold mine? A. Yes, sir.

Q. Did they operate by means of a vertical shaft?

A. Yes, sir.

Q. About how deep was that mine?

A. A little over four hundred feet.

Q. State whether or not that was operated with a sheave-wheel and hoist—hoisting the ore by means of sheave-wheel, cable and skips?

A. Yes, sir, and hoisting engine.

Q. State what, if anything, you had to do with the sheave-wheel that were used in hoisting the ore from that mine? A. Installing it.

Q. State what you had to do with that sheave-wheel over there, if anything?

A. There were several sheave-wheels in that shaft.

Q. I mean the hoisting sheave-wheel—the main sheave-wheel? A. We installed them.

Q. Who installed them?

A. I installed them; there were two installed.

Q. What kind of a sheave-wheel was that?

A. You mean the metal that was in it?

Q. Yes. A. Cast-iron sheave-wheel.

Q. What are sheave-wheels used in mining made of usually—what is the usual material they make them of?

Mr. COBB.—Objected to as immaterial.

COURT.—Overruled.

A. I never saw anything except a cast-iron sheave-wheel in my life.

(Testimony of W. C. Angell.)

Q. Let's see now—you worked as a machinist in charge of the machinery there for five years until 1897—then where did you go?

A. I came to Juneau in 1897.

Q. What did you do in Juneau?

A. First worked in the Alaska Steam Laundry installing their plant; after that I went to work for the Treadwell company.

Q. What was the nature of your duties there—what branch of work were you engaged in there?

A. A machinist in the blacksmith-shop.

Q. Did you have anything to do with installing the hoist there in 1898? A. Yes, sir, I did.

Q. I believe you stated before that it was a cast-iron sheave-wheel that you saw there in 1898?

A. Yes, sir.

Q. When did you leave Treadwell?

A. At that time I left there in the early spring of 1899.

Q. You did what?

A. I left there that time in the early spring of 1899.

Q. Where did you go then?

A. I went to Skagway.

Q. What did you do there?

A. Worked as machinist for the White Pass & Yukon Railroad.

Q. You are still working for them as machinist?

A. Yes, sir.

Q. How long did you stay there?

(Testimony of W. C. Angell.)

A. Until the spring of 1901.

Q. Then where did you go?

A. Returned to Treadwell.

Q. I believe I asked you if you had anything to do with the installation of that hoist—did you have charge of installing that hoist?

A. Yes, sir, in 1898.

Q. You went there again in 1901?

A. Yes, sir.

Q. How long did you work there then?

A. At that time about two months.

Q. As a machinist?

A. I was in charge at that time.

Q. Where did you go then?

A. Returned to Skagway then.

Q. What did you do there?

A. Was machinist there and then I returned to Treadwell that same summer.

Q. Where was you employed in Skagway?

A. The White Pass & Yukon Railroad shops.

Q. How long have you been employed there this time? A. Since January, 1906.

Q. That is a little over a year?

A. With the exception of one month.

Q. Were you ever employed in Juneau as a machinist?

A. I was employed in the Union Iron Works and afterwards for Stevens & Buschour.

Q. During your apprenticeship and these other places where you have worked have you had occa-

(Testimony of W. C. Angell.)

sion to examine the metal out of which mining machinery is usually made—to study the characteristics of it? A. Yes, sir.

Q. Have you noticed it in repairing such machinery? A. Yes, sir.

Q. During the time you were employed in the Treadwell Mine did you ever see a sheave-wheel, a six-foot hoisting sheave-wheel, that was composed of any other material than cast iron?

Mr. COBB.—We object to that as incompetent, irrelevant and immaterial.

COURT.—Overruled.

A. Please repeat the question.

Q. During that time—the time you were employed at Treadwell—did you ever see any six-foot hoisting sheave-wheel that was made of anything but cast iron? A. No, sir, I never did.

Q. I am going to ask you a hypothetical question and I wish you would bear it in mind, so that you can answer it and give your opinion. Suppose a weight of 10,000 pounds is to be hoisted out of a vertical shaft of a mine, and the hoisting is being done by means of a skip, a cable, a drum and an engine—the cable attached to the skip in the shaft of the mine then passing up to the top of the shaft-house over a sheave-wheel, and then around a drum which is revolved by the action of steam. This sheave is a cast-iron sheave-wheel six feet in diameter with six spokes with flanges around the edge. The drum has a pull on the sheave-wheel at an angle of about forty-five degrees; the distance from the bottom of the shaft to the mouth

(Testimony of W. C. Angell.)

or collar of the shaft is about seven hundred and fifty feet. The drum is about six feet in length and it is six feet in diameter. While the machine is in operation a piece breaks out of the flange of the sheave-wheel—the piece is from twelve to fourteen inches in length and two or three inches in depth—extending below the top of the cable as it lays in the groove of the wheel. Now, basing your opinion on your experience and upon your observation from your apprenticeship and your various employments as a machinist and in and about sheave-wheels and mining machinery and the characteristics of metals and methods of hoisting as I have described here, can you form an opinion as to whether or not that wheel, after being repaired, was a safe and suitable piece of machinery to be used for the purposes I have stated? Do you understand the question? A. Yes, sir.

Q. The question is whether you are able to form an opinion about that? A. I am.

Q. What is it?

Mr. COBB.—I would like to examine him as to his qualifications.

COURT.—You may do so.

(By Mr. COBB.)

Q. Did you ever see a sheave-wheel repaired when broken in this manner?

A. Something similar to that.

Q. Where?

A. At Skagway. I did not repair them myself. I have seen them repaired.

(Testimony of W. C. Angell.)

Q. Did you ever repair any yourself?

A. Not at Skagway.

Q. Where? A. At Unga, Alaska.

Q. What was the size of that wheel?

A. Four feet, if I remember.

Q. That was a four-foot wheel?

A. Yes, sir.

Q. Did you repair it when the flange was broken?

A. Yes, sir.

Q. Where else did you repair any?

A. That is the only one I did repair.

Q. Did you ever see any repaired anywhere else?

A. Only at Skagway.

Q. What size wheel did you see repaired there?

A. I have seen several sizes, some as large as seven or eight feet.

Q. What were they used for?

A. They were sending them to Dawson.

Q. Why were they repaired there?

A. They were broken in shipping and repaired there.

Q. Did you repair them? A. No.

Q. Just saw them repaired? A. Yes, sir.

Q. Who was they repaired by?

Mr. JENNINGS.—We object to that. That has nothing to do with his qualifications.

COURT.—Yes, that is all you are cross-examining him upon now.

Q. The only wheel you ever repaired was this four-foot wheel at Unga? A. Yes, sir.

(Testimony of W. C. Angell.)

Mr. COBB.—I do not think he has qualified himself sufficiently to pass an opinion on a question of that character.

Mr. JENNINGS.—I was not asking him about repairing the wheel.

COURT.—It may be overruled.

(By Mr. JENNINGS.)

Q. Do you remember the question?

A. Yes, sir.

Q. Give us your opinion as to whether that was a safe instrumentality for use for that purpose?

Mr. COBB.—We object on the ground that the witness has not shown himself qualified to answer.

COURT.—Overruled. It is impossible for the Court to determine it, and I do not know that the Court ought to do it. The jury must determine what credency they will give to his testimony.

Mr. COBB.—We reserve an exception.

Q. Is a wheel broken in that way a fit and suitable instrument to raise that weight?

A. No, sir, it is not.

Q. Explain what the danger would be in a case of that kind?

A. It would be apt to cut the cable or leave the flange of the wheel and drop to the shaft—leave the sheave-wheel altogether.

Q. Would that be the natural and probable result or just a conjectural result?

Mr. COBB.—Objected to as leading.

COURT.—I am inclined to sustain the objection.

(Testimony of W. C. Angell.)

Q. Well, I will ask you to state if that was likely to happen—one of those two cases?

A. Yes, sir.

Q. What is liable to happen—what would be the natural and probable consequences if the cable should slip off the sheave-wheel and fall to the shaft?

Mr. COBB.—We object to that.

COURT.—Overruled.

Mr. COBB.—We reserve an exception.

Q. Did you understand the question—what would be the natural and probable effect if the cable should slip off the wheel and fall to the shaft?

A. It would be very liable to break.

Mr. COBB.—We object to him testifying about that until he has qualified himself. He has not shown that he knows anything about that matter.

COURT.—You have not shown that he does. You may do so if you can.

Q. I will ask you this question. Do you know what kind of cables are used in that mine?

A. Yes, sir.

Q. You know that usually a 1⅛-inch wire cable is used? A. Yes, sir.

Q. You know how strong they are as a rule—I do not mean in units of strength, but in a general way how much weight they are supposed to hold?

Mr. COBB.—Objected to as leading.

COURT.—Objection sustained.

Mr. COBB.—We object, on the further ground that he is not qualified to give an opinion as to the strength of the cable.

(Testimony of W. C. Angell.)

Mr. JENNINGS.—That is part of the equipment of a hoist.

COURT.—Go ahead, gentlemen.

Q. You assisted in the installation of this plant?

A. Yes, sir.

Q. You know what kind of a sheave-wheel they were using? A. Yes, sir.

Q. You know what kind of a rope they used?

A. Cable; yes, sir.

Q. You know what kind of weight was being hoisted from the shaft? A. Yes.

Q. I will ask you if that break would not be liable to cut that cable—what would be liable to happen?

Mr. COBB.—We object—

The Court will permit you to show any work that he has done with cables or any information that he has about the operation of cables and hoists and the ability of certain cables to resist certain strains.

Q. Have you had any experience with cables lifting weights in mines as would enable you to determine whether such a rope would sustain such a weight under those circumstances?

A. I never saw a cable broken in a mine in hoisting alone.

Mr. COBB.—We object to this testimony.

COURT.—Objection sustained.

Mr. JENNINGS.—We will pass that, then. I wish to save an exception to your Honor's ruling.

Q. Could a wheel so broken as I have described be repaired so as to make it a safe and suitable instrument for use for the purpose aforesaid?

(Testimony of W. C. Angell.)

A. No, sir; I do not think it could.

Q. You do not think it could? A. No, sir.

Q. Did you ever undertake to repair any yourself?

A. Only the one wheel at Unga which I repaired.

Q. Was that broken below the cable as it lay in the groove? A. No, it was not.

Q. Suppose a wheel broken in the way I have stated was repaired in the following manner: Suppose the piece which was broken out or a piece similar to it was replaced and a piece of boiler iron, or steel, or any other strong material was placed on the outside of the flange extending three or four inches beyond each end of the break and riveted on there and the broken piece riveted in place, would that render the wheel a fit instrumentality or piece of machinery for the purpose aforesaid?

A. No, sir, it would not make it any stronger.

Q. What effect would the boring of the holes for the rivets have on the metal—would it strengthen or weaken it?

A. It would certainly weaken it.

Q. What should be done with a sheave-wheel broken as I have described?

A. I should replace it with another.

Q. You would not use it again at all?

A. No, sir.

Q. You would not consider it safe?

Mr. COBB.—Object to his leading the witness.

COURT.—Sustained.

(Testimony of W. C. Angell.)

Q. What effect, if any does the riveting—the boring of holes and the riveting have on other parts of the wheel—that is to say, I mean the metal of which the wheel is composed?

A. If I should drive a rivet into a hole like that solid, it would act as a wedge between two solid bodies.

Q. Would there be any way that you know of or that you ever heard of as a machinist of estimating the strength of such a wheel after it was so broken?

A. No, sir.

Q. Now, a wheel so broken and so repaired is put up again and was used in the work of hoisting. The wheel broke again in this way. One end of the the break is right at the rivet hole, right through the rivet hole and two or three feet of the perimeter is broken out of the wheel—assuming that it was a good wheel before it was patched and everything was used in the ordinary way—the wire cable broke and the skip was precipitated to the bottom of the shaft. Now, are you able to give an opinion based on your knowledge and experience of the conditions which I have just indicated as to what caused that sheave-wheel to break?

Mr. COBB.—W object to the question as assuming an hypothesis—I object to his assuming that it was a good wheel in the first instance or not or whether it was broken because of the load. I object to his assuming what is not in the evidence.

COURT.—They must assume one or the other. I think the objection may be overruled.

(Testimony of W. C. Angell.)

Mr. COBB.—Except.

Q. You heard the question? I asked you if you could give an opinion as to the case of the perimeter breaking the second time as to what caused it. Are you able to give an opinion on that subject?

A. Yes, sir.

Q. What do you think caused it?

A. It was caused by the original break. The fact that it broke at the rivet holes showed that it weakened the wheel, and the wheel was not capable of sustaining the weight.

Q. What effect on the cable would the breaking of the sheave-wheel have—what would happen—what would the cable do?

Q. The cable would naturally drop to the shaft—drop to the axle.

Q. Suppose the wheels in question were made of cast steel or any other material than cast iron, what would be your answer to the proposition as I have mentioned it to you?

A. It would be the same.

Q. You do not think it would make any difference?

A. No, sir; as long as the sheave-wheel broke.

Q. Would boring holes in cast steel have the same effect as boring them in cast iron?

A. Yes, sir.

Q. It would weaken it—necessarily weaken it?

A. Yes, sir.

Q. Supposing the rivets are countersunk, what do you mean by that?

(Testimony of W. C. Angell.)

A. The hole for the head of the rivet is made larger than the diameter of the rivet; for instance, if a rivet hole was counter-sunk, it would be perhaps ¾ of an inch in diameter and taper down to one-half inch or less to the diameter of the rivet.

Q. Now, Mr. Angell, I want to ask you this question. From the fact that a piece such as I have described to you had broken out of the wheel, and from the fact that it had broken off in the way that I have described to you, what would that indicate to you as to whether the wheel was made of cast steel or cast iron?

Mr. COBB.—We object to that—

COURT.—Overruled.

A. The break would indicate that it was cast iron —cast steel would not break that way.

Q. Steel will bend before it will break?

A. Yes, sir, it will.

Q. Then, if you knew that a piece had broken out of a wheel as I have indicated—that it broke and did not bend that would indicate to you that it was made of cast iron?

Mr. COBB.—We object to that as leading.

COURT.—Objection sustained.

Q. I believe you stated that you repaired a wheel that was broken below where the cable rested—how did you come to repair it at all?

Mr. COBB.—We object to that as immaterial.

COURT.—I am inclined to sustain the objection.

That is all.

(Testimony of W. C. Angell.)

Cross-examination.

(By Mr. COBB.)

Q. Your deposition was taken in this case about the 5th of last April at Skagway?

A. Yes, sir.

Q. What did you come down for—to Juneau?

A. Subpoena was served on me by the United States Marshal and I had to come.

Q. Did't you know that Skagway was more than a hundred miles away and that you did not have to come?

A. Yes, but there was an order signed by the Judge and I had to; it commanded me to be here on May 6th.

Q. That is the reason you came?

A. Yes, sir.

Q. Did you have any talk with Mr. Jennings before coming?

A. Before coming down—in regard to coming.

Q. Yes.

A. Not in regard to coming.

Q. Let me have that deposition. You said a moment ago, Mr. Angell, that a steel wheel would break just the same as an iron wheel if repaired in that way?

A. I did not say it would appear the same as that—the fracture would be different.

A. But the wheel was liable to break if it was of steel just as much as an iron wheel would?

A. Yes, sir.

(Testimony of W. C. Angell.)

Q. Is that your signature?

A. Yes, sir, it is.

Q. That is a deposition taken last month at Skagway? A. Yes, sir.

Q. In this deposition Mr. Jennings asked you this question: "Now, I ask you if the wheel were made of cast steel and were so broken and so repaired would it be a suitable instrumentality? Answer: Steel would not break that way. Q. Did you testify that way.

A. Steel might not break the same way.

Q. Steel might not break the same way?

A. No, it might not break exactly the same way.

Q. Just answer the question; did you testify that way? A. Read it again.

Q. "Now, I ask you if the wheel were made of cast steel and were so broken and so repaired would it be a suitable instrumentality? Answer: Steel would not break that way." The question is whether you answered that way or not?

A. Yes, sir, I did.

Q. You were fired from the Treadwell mine?

A. I was discharged.

Q. For incompetency?

A. No, sir, for not reporting for duty for a few days.

Q. You did not go back?

A. I have worked for them since that time.

Q. Did Mr. Jennings tell you that you were the only witness that he could get to testify that that

(Testimony of W. C. Angell.)

wheel was cast iron and that he had to have you here? A. No, sir.

Q. Ever tell you anything of that kind?

A. No, sir, he did not.

Q. He did not tell you that you were so important a witness that he could not go to trial unless he had your testimony here and had you here to testify that that was a cast-iron wheel? A. No, sir.

Q. Now, when your testimony was taken at Skagway last month—just a little further on Mr. Jennings asked you, "Do you know the characteristics of cast steel? Answer. Yes, to a certain extent." Q. You testified to that?

A. Yes, sir.

Q. The next question is, "Well, I will ask you if you know enough to answer whether or not if a wheel were made of cast steel it would break out in the way I mentioned? Answer: No, it would not." You testified to that? A. Yes, sir.

Q. I believe you stated to the jury that a cast-steel wheel would not break—did you testify to that?

A. I said it would bend before it broke.

Q. Do you wish to go on record as saying that it is not brittle?

A. That is a different proposition.

Q. What is the difference between cast iron and cast steel?

A. One has less carbon in it than the other.

Q. Which has the less carbon?

A. Cast iron has the most—steel has not so much.

Q. You are an expert on that subject?

(Testimony of W. C. Angell.)

A. Not necessarily.

Q. How much more has it?

A. I don't know—different kinds of steel have different proportions of carbon.

Q. You say cast iron has the most carbon in it?

A. Yes, I have been told so. I do not profess to be an expert on the different forms of cast steel and iron.

Q. Are you such an expert that you can tell by just glancing at it which is cast steel and which is cast iron? A. I can; yes, sir.

Q. And you wish to tell this jury that cast iron has more carbon in it than cast steel?

A. That is what I have been taught.

Q. Do you know anything about King's Mechanical Manual?

A. I have heard of it—yes, sir.

Q. That is one of the standard authorities?

A. I never saw that in text-books. It is not part of my business to keep up on those things.

Q. But you are here testifying that that wheel was made of cast iron.

A. I can tell cast iron from cast steel.

Q. But you do not know its component parts?

A. No, sir.

Q. Now, then, the only test you have between cast iron and cast steel is by sight?

A. No, sir.

Q. What are some of the other tests?

A. Working it up into machinery.

(Testimony of W. C. Angell.)

Q. If you had a piece of metal and worked it up into machinery you could tell?

A. It would be hard work; that is the reason it is cast.

Q. Answer my question. If you did have occasion to work it up it would be a full test?

A. It would be one of the tests.

Q. Would it be the best test?

A. It would be probably to some people.

Q. You are an expert?

A. I certainly understand the business; yes, sir.

Q. Do you know the weight that sheave-wheel was calculated to bear?

A. Calculated to bear?

Q. Yes, what it was intended to bear?

A. Approximately what it was intended to bear by the manufacturers.

Q. What I am asking you is whether you can tell approximately what that sheave-wheel was intended to bear?

A. I could not tell—I probably could not tell exactly.

Q. The engine was in proportion to the work—the weight the sheave-wheel was intended to bear?

A. That is always figured out at the factory.

Q. The power of the engine has nothing to do with the weight the wheel would bear would it?

A. Certainly—

Q. Do you mean that the engine would have some effect on the weight that the sheave-wheel would bear?

(Testimony of W. C. Angell.)

A. I say that if the sheave-wheel was heavier than the one used there it would bear a greater weight.

Q. What I am asking you is if the engine was of greater power if that would have anything to do with the weight the sheave-wheel would have to bear?

Q. If the engine was larger it should have a greater weight on the sheave-wheel.

Q. That is not the question has it anything to do with the weight the sheave-wheel would have to bear?

A. What the engine has to do with the weight the wheel is capable of bearing?

Q. Yes.

A. It is made according to the capacity of the engine.

Q. Do you mean that the strain on the wheel becomes greater according to the capacity of the engine?

A. No, sir, I did *not any* such thing.

Q. What did you mean then?

A. What I mean to say is the strain might be greater or less according to how the engine worked.

Q. That may be true.

A. Any mechanic would know that.

Q. You testified about it and I want you to tell us how much that wheel is capable of bearing.

A. I could not tell exactly.

Q. You don't know?

(Testimony of W. C. Angell.)

A. Not definitely or positively. I have a general idea.

Q. You have a general idea about it?

A. Yes, sir.

That is all.

Redirect Examination.

(By Mr. JENNINGS.)

Q. Mr. Cobb asked you if you were fired for incompetency from the Treadwell mine. I will ask you if you were ever discharged from any mine for incompetency or from any occupation in which you were employed?

A. No, sir; I never have been.

Q. Mr. Cobb asked you something about what that sheave-wheel was calculated to bear. You answered that you did not know how much it was calculated to bear but that you know what it was intended by the manufacturers to bear. Will you tell us what it was intended to bear?

COURT.—He said he did know.

Q. You installed this plant? A. Yes, sir.

Q. What amount of weight—what weight was it intended to bear.

A. This sheave was to carry the car, two tons of ore and the cable.

Q. Who served the subpoena for you to appear in this case?

A. Judge LeFevre, the United States Commissioner at Skagway.

Q. You said also that the capacity of the sheave-wheel would depend somewhat on the working of

(Testimony of W. C. Angell.)

the engine. Explain to the jury how the engine might effect the sheave-wheel?

Mr. COBB.—We object to that.

COURT.—Overruled.

Q. Just explain to the jury what effect the engine would have on the weight the sheave-wheel would have to bear?

A. The sheave would have to resist not only the weight of the skip and the ore and cable but also the pull of the engine and as that increased the load on the sheave-wheel would increase.

That is all.

COURT.—Gentlemen of the Jury: When Court takes a recess it will be until ten o'clock to-morrow morning. You should remember the admonition heretofore given you by the Court not to talk to anybody about this case nor permit anybody to talk to you about it. If they should attempt to talk to you, tell them you are on the jury and they must not do so. If they persist in it you must report the whole matter to the Court.

Court will be at recess until ten o'clock to-morrow morning.

May 15, 1907.

Court convened pursuant to adjournment at 10 o'clock A. M. and all parties being present as heretofore, the following proceedings were had and testimony taken:

Mr. JENNINGS.—I would like to ask Mr. Angell one more question before I close.

W. C. ANGELL, a witness heretofore called on behalf of the plaintiff, having been heretofore duly sworn, resumed the stand for further examination:

Direct Examination.

(By Mr. JENNINGS.)

Q. You testified that while you were working at Unga in charge of a mine there you did repair a sheave-wheel which was broken in that plant?

A. Yes, sir.

Q. And you testified before when I put that hypothetical question to you what should be done with a sheave-wheel, you testified that it should be thrown away. I will ask you whether or not any men were working under the sheave-wheel which you repaired at Unga?

Mr. COBB.—We object to that as incompetent, irrelevant and immaterial.

Mr. JENNINGS.—I think it is material in connection with his testimony.

COURT.—I don't think it is.

Mr. JENNINGS.—I want to show the situation at Unga.

COURT.—I do not think that has anything to do with this case.

Mr. JENNINGS.—It is simply in explanation of his testimony. I understood him to state that a wheel situated as this wheel was over at Treadwell—situated over a shaft where men were working underneath that a wheel of that kind should not be repaired.

(Testimony of W. C. Angell.)

And he testified that he did repair one at Unga and I wish to show the situation at that place?

COURT.—I think the objection ought to be sustained.

Q. You stated yesterday that you knew what that plant over there—that sheave-wheel was intended—what weight it was intended to carry and what kind of a skip it was intended to carry. I believe you said a two-ton skip. What did you mean by a two-ton skip?

Mr. COBB.—Objected to as repetition. That was in 1898.

COURT.—Objection overruled.

Q. What did you mean by a two-ton skip?

A. I mean a skip sufficiently large to hoist two tons of ore.

Q. And the engine and this sheave-wheel and the whole plant was intended to operate a skip of that capacity?

Mr. COBB.—We object to that as leading.

Mr. JENNINGS.—All right. That is all.

Mr. COBB.—I wish to recall Mr. Angell for cross-examination. I will state that the reason that I am not ready to cross-examine him at this time is that I have been unable to get prepared for it. His testimony is different from that taken in the deposition and on the former trial, and I am making preparation to examine him strictly upon his qualifications as an expert.

Mr. JENNINGS.—I submit that counsel has not stated any reason for not cross-examining this wit-

(Testimony of W. C. Angell.)

ness at this time. He has simply made some statements which were all calculated to influence this jury. I do not think any legal reason has been given.

COURT.—I do not want to prevent you from making whatever case you have to make but I think it ought to be done orderly.

Mr. COBB.—We could not possibly get ready before half past one.

COURT.—I will take the burden of permitting you to recall him at that time. With that understanding counsel may proceed.

Mr. JENNINGS.—I understand he is to be recalled only for that particular purpose.

COURT.—Yes, the record will show just what the request was.

Mr. JENNINGS.—We rest.

Plaintiff Rests.

Testimony for Defendant.

[Testimony of David Landsberg.]

DAVID LANDSBERG, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name?

A. David Landsberg.

Q. Where do you reside? A. Treadwell.

Q. How long have you resided there?

A. About eight years and a half.

Q. What is your occupation?

(Testimony of David Landsberg.)

A. Foreman at the Treadwell mine now.

Q. Where did you live in 1903?

A. At Treadwell.

Q. What was your business at that time?

A. I believe shift boss in 1903.

Q. In 1903?

A. Four years ago this summer—shift boss.

Q. Whereabouts were you working as shift boss?

A. At the Treadwell mine.

Q. Do you know where the main shaft of the Treadwell mine is? A. Yes, sir.

Q. In connection with your duties as shift boss in 1903 did you have occasion to go into that shaft any? A. Yes, sir.

Q. Did you have occasion to see the hoist which operates there? A. Yes, sir.

Q. As shift boss, Mr. Landsberg, I will ask you to state to the jury if there was any rules or regulations in force requiring the shift bosses to go around and inspect the machinery?

A. Yes, sir, there was.

Q. State to the jury what they were and what you were required to do?

A. Every day either the shift boss or foreman was required to go around and see that everything was in good working order before we started to work—started to hoist.

Q. Make an inspection of the sheave-wheel?

A. Always one of us would go up and see the wheel.

(Testimony of David Landsberg.)

Q. How often was that done?

A. Three times a day for quite a while.

Q. What time in reference to the changing of shifts?

A. The engineer—the hoist engineer examined the wheel after every eight hour shift.

Q. At the time of changing shift?

A. When they changed shifts they examined the wheel.

Q. Are the shift bosses required to make any examination? A. Yes, sir, they were.

Q. When was that?

A. Just about the time you speak of there.

Q. How long had you been working at the Treadwell in 1903? A. All together?

Q. In 1903?

A. Right there all the time—right along.

Q. How long had you been shift boss at that time?

A. I think about two years probably three years.

Q. Do you remember an accident that happened at the Treadwell shaft on or about the 5th day of August, 1903? A. Yes, sir, I do.

Q. When did you inspect that hoist prior to that time?

A. Well, about a day or two before the accident happened.

Q. You had personally examined it?

Mr. JENNINGS.—You are speaking of the shaft —do you mean the hole and the hoist including the sheave-wheel and engine?

(Testimony of David Landsberg.)

Q. If you will give me an opportunity I will get to that. State what you did to the best of your recollection? A. What I saw?

Q. What part of the machinery you examined?

A. Well, I seen the sheave-wheel.

Q. How did you get up to the sheave-wheel?

A. There is a runway up there—walk-up.

Q. You went up and examined it?

A. Yes, sir.

Q. State whether or not you found it in good condition?

A. It was newly repaired it was all right.

Q. Did you examine it carefully to see if it was all right— A. Yes, sir.

Q. Tell what you did.

A. I just looked at the sheave-wheel to see if it was all right. I did not look at the hoist at all that time.

Q. The engineer looked after that?

A. Yes, sir.

Q. Who was the engineer?

A. I think in charge of the master mechanic.

COURT.—You are speaking of the engine used in hoisting? A. Yes, sir.

A. Yes, sir.

Q. The hoist itself—the hoist and rope and engine who was in charge of that?

A. Either the master mechanic or foreman; I am not sure which.

Q. It was not in your charge? A. No, sir.

(Testimony of David Landsberg.)

Q. State how long it was before you were up to the sheave-wheel after the accident happened?

A. I was up there the next morning.

Q. What time? A. About half-past six.

Q. Did you see the sheave-wheel?

A. I seen that sheave-wheel at half-past eleven the same day.

Q. Did you examine its condition?

A. I did; I went over and looked at it.

Q. Did you look at it carefully?

A. Just to see where it was broken.

Q. Examine the break in it? A. I did.

Q. I will ask you if there was any part of that wheel which had been repaired prior to that time?

A. Yes, sir.

Q. Tell the jury what that was?

A. There was a piece about four or five inches long of the flange of the wheel which was repaired.

Q. Explain to the jury how it was repaired?

A. It was repaired with a piece of boiler plate riveted on to the flange of the wheel.

Q. The piece which had been broken out—where was that put? A. I suppose put back in place.

Q. That break where it was repaired was the groove itself injured?

Mr. JENNINGS.—Objected to as leading.

COURT.—Go ahead.

Q. What was the condition of the groove in regard to the repair? A. What do you mean?

Q. I want you to state whether it was smooth or rough—what condition the groove was in?

(Testimony of David Landsberg.)

A. The rivets were counter-sunk—the rivets were all filed smooth inside the wheel.

Q. How deep down in reference to the rope itself, the cable did this break go—did it extend above or below the top of the cable as it lay in the groove of the wheel? A. A little above.

Q. It did not extend down to the top of the cable as it lay in the groove? A. Not quite.

Q. Just state whether or not the rope bore at all upon the repaired portion of the flange?

A. No, it did not.

Q. When you saw the wheel about eleven o'clock the next day, tell the jury the condition it was in in reference to being broken at that time?

A. The wheel was broken about eight or nine inches from where the repair—the patch was. It was broken from over the spoke. The repair was still on the wheel as it was put.

Q. Do you mean that a piece was broken out of the perimeter of the wheel?

Mr. JENNINGS.—Objected to as leading.

COURT.—Overruled.

Q. Do you mean that a piece was broken out entirely out of the rim of the wheel?

A. Broken out about eight or nine inches all together right over the spoke.

Q. Was there any of this break through any portion of the wheel that had been repaired—this piece which was broken out—was there any portion of that break through the portion of the wheel that had been repaired? A. No, sir.

(Testimony of Albion Bartello.)

Q. The repaired part of the wheel was still there?

A. It was still there when I seen it.

Q. Did you see the wheel at any time after that day?

A. No, sir, they took the wheel away after that.

Mr. COBB.—You may cross-examine.

[Testimony of Albion Bartello.]

ALBION BARTELLO, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. Where did you reside in 1903?

A. Douglas Island, Alaska.

Q. Were you residing there in the month of August, 1903? A. Yes, sir.

Q. What were you doing during that month?

A. I was contracting for the Treadwell mine.

Q. What were you doing then?

A. Drifting, raising and sinking.

Q. State whether or not you had anything to do with the shaft? A. Yes, sir.

Q. What? A. Sinking it.

Q. Did you know one Joe Leon?

A. Yes, sir.

Q. Was he employed there at the time of the accident on the 5th of August, of that year?

A. Yes, sir.

Q. At that time, Mr. Bartello, had you had any experience in mining and sinking shafts?

(Testimony of Albion Bartello.)

A. I had been doing that for fourteen or fifteen years before that continuously.

Q. And you were familiar with that work?

A. Yes, sir; I think I was.

Q. Were you familiar with bulkheads in shafts—do you know how they should be built?

A. Yes, sir.

Q. How long had you been at work on this particular shaft for the Treadwell people on the 5th of August, 1903? A. It was a little over a month.

Q. Had you ever seen the bulkhead at the 750-foot level of that shaft? A. Yes, sir.

Q. Just describe to the jury what sort of a bulkhead that was.

Mr. JENNINGS.—May I ask him a few questions as to his qualifications?

COURT.—No; he is not offered as an expert yet; he is simply asked to describe the bulkhead as it was.

Q. Just describe to the jury what sort of bulkhead that was.

A. It was a bulkhead made of three-fourteen by sixteen inch timbers which were laid across the shaft. One end setting on the floor of the station. The station was twenty-two or twenty-three feet high. Right at the station and these timbers were a little longer that that. They were set at an angle. It was put up that way in case the skip should fall.

Q. I will get you to describe to the jury how those timbers were set—what they rested on?

(Testimony of Albion Bartello.)

A. They were leaning against the wall of the shaft and rested on the edge of the station—set on the edge of the station here and rested against the wall there.

Q. Do you know the purpose for which they were set in that position?

Mr. JENNINGS.—Objected to as incompetent, irrelevant and immaterial.

COURT.—Overruled.

Q. Do you know the purpose for which the bulkhead was put in that position, inclined in that way?

A. Yes, sir.

Q. State to the jury what it was for.

A. In case the cable should break and the bucket fall it would have a chance to glance or run out into the station.

Q. You say you are familiar with the method of constructing bulkheads in mines of this kind?

A. I have seen lots of them.

Q. Have you ever built any? A. Yes, sir.

Q. State, Mr. Bartello, whether or not that bulkhead which was in there on that day was a reasonably safe and secure bulkhead?

Mr. JENNINGS.—I would like to ask him a few questions on his qualification.

COURT.—You may do so.

(By Mr. JENNINGS.)

Q. Where did you build any bulkheads?

A. In Italy.

Q. What mine? A. Fire brick quarry.

(Testimony of Albion Bartello.)

Q. Did you ever build any in America?

A. I have helped to build some.

Q. Where?

A. Some in the Treadwell mine.

Q. Where else did you build any?

A. Helped to build some in the Nanaimo coal mines.

Q. What kind of mines were they—what kind of shafts?

A. This was a manway like the one I built in Nanaimo.

Q. The manway is a compartment of the shaft where men go to go to work?

A. Yes, the ladder-way.

Q. When did you build any in Nanaimo?

A. In the year 1898.

Q. How many did you help to build in Nanaimo?

A. I helped build one.

Q. What other bulkheads did you help build?

A. One in the Don Senora mine.

Q. How deep was that mine?

A. A couple of hundred feet.

Q. What kind of a shaft was that—in the coal mine?

A. Same kind of a shaft as the Treadwell.

Q. I did not ask you that—was it a vertical shaft or a tunnel? A. Perpendicular shaft.

Q. Well, where else did you help build any bulkheads?

A. That is all I have done myself.

(Testimony of Albion Bartello.)

Q. That is the only experience you have had in this country? A. Yes, sir.

Q. When did you work in that mine in Italy?

A. In 1886.

Q. What kind of a mine was that?

A. Fire brick quarry.

Q. How deep was it?

A. Four hundred—four hundred and fifty feet.

Q. What kind of a shaft.

A. A perpendicular shaft.

(By Mr. CHENEY.)

Q. Did you say anything about the bulkheads you built being simply in the manway they were not hoist-ore out of that shaft?

A. No.

Q. No skips at that mine like at Treadwell going up over the men? A. No.

Q. In Italy were skips running like they were at Treadwell? A. They were working in it.

Q. You worked as a miner?

A. I worked there as a laborer.

Q. Just state, Mr. Bartello, whether or not this bulkhead at the 750-foot level at Treadwell which was in there on the 5th day of August, 1903, was a reasonably safe and secure bulkhead?

A. If I did not think so; I would not be there. Certainly I did consider it was safe.

Q. State whether or not you worked in there yourself? A. Yes, sir.

(Testimony of Albion Bartello.)

Q. Now, I will ask you, Mr. Bartello, how the men that were working at the bottom of that shaft got down to work?

A. Came down in the cage as far as the level—the foot of the bulkhead at the 750-foot level in the first compartment of the shaft called the manway and in a little hoist from there for the purpose of going down to the work.

Q. State whether or not they passed by this bulkhead in going down to the work? A. Yes, sir.

Q. Do you know whether Joe Leon had any opportunity to see that bulkhead?

A. How is that?

Q. Just state what opportunity Joe Leon had of seeing this bulkhead?

A. As well as all of us—any one when they came down could see it.

Q. How long had he been engaged in working in that mine?

A. He worked for me about a month.

Q. Down in that mine? A. Yes.

Q. How did they get in and out of that mine?

A. In a cage.

Q. Where does that cage work in the shaft?

A. From the surface.

Q. From the surface up and down the shaft. Now, going to and from his work would he have to pass by the bulkhead at the 750-foot level?

A. Yes, sir.

Q. Do you know whether or not Joe Leon was a drinking man?

(Testimony of Albion Bartello.)

A. Like mostly all miners, I guess.

Q. What is your answer?

A. Like most all miners.

Q. How is that?

A. They are all inclined to take a drink occasionally.

Q. Did you ever see him under the influence of liquor? A. Yes, sir.

Q. How often?

A. I saw him come around looking for work when he was half shot, as they call it.

Cross-examination.

(By Mr. CHENEY.)

Q. When was this you say this bulkhead that was made of three timbers 14x16 inches placed at an angle across the shaft?

A. Yes, placed at an angle of about forty-five degrees.

Q. When did you people put it in?

A. Put right in after we started the shaft.

Q. You started about a month before he was killed? A. Yes, sir.

Q. It was put in about that time?

A. Yes, sir.

Q. You could not give the dimensions of those timbers?

A. I could in inches more or less.

Q. What would you say was the size of them?

A. I could not say anything better than in the neighborhood of fourteen or sixteen inches.

(Testimony of Albion Bartello.)

Q. You would not say they were 12x12 inches made of Alaska spruce?

A. It may possibly have been 12x12.

Q. The men who built it would know?

A. Yes. That is more than I can tell. I am not a carpenter.

Q. He would know, the man that built it?

A. I should think so.

Q. That was a movable bulkhead?

A. Yes, sir.

Q. Fixed so it could be raised up against the wall? A. Yes, sir.

Q. At other times it was down and if they should want to lower the skip below the 750-foot level it was raised with a block and pully? A. Yes, sir.

Q. Sometimes it was up and sometimes it was down? A. Yes, sir.

Q. Where was you at the time of the accident?

A. I was home in bed at the time.

Q. You don't know whether it was up or down?

A. I am sure the bulkhead was down.

Q. You are sure? A. I am sure.

Q. You was not there—how are you sure?

A. The timbers will show you that.

Q. They were all smashed? A. Yes, sir.

Q. You say they were twenty-two or twenty-three feet long—you are not sure of that—that is just your opinion? A. Yes, sir.

Q. You say so far as you know Joe Leon drank a little on different occasions? A. Yes, sir.

(Testimony of Albion Bartello.)

Q. That is all you know about him?

A. That is all I know about him.

Q. You were contracting over there at that time?

A. Yes, sir.

Q. You had been sinking that shaft for a month?

A. We took what came in the shaft.

Q. You only asked him about his work?

A. They ask me for work.

Q. You did talk with Joe Leon?

A. Yes, sir.

Q. He wanted to come to work?

A. Yes, he told me so.

Q. You knew he was a good workman?

A. Yes.

Q. You knew he was a good man that is the reason you hired him? A. Yes, sir.

Q. He had only worked there for a short time?

A. Yes, sir.

Q. He had only worked there for a few hours?

A. Yes, sir.

Q. He commenced to work at seven o'clock and was killed one or two o'clock in the morning?

A. Yes, sir.

Q. He had been at work around that mine for a month?

A. Yes; he had been on the same level for a month before—he was watching for a chance to get work on that shaft.

That is all.

(Testimony of Albion Bartello.)

Redirect Examination.

(By Mr. COBB.)

Q. Did he tell you whether he was familiar with that work.

Mr. JENNINGS.—Objected to as leading.

COURT.—Yes, it is leading.

Q. Did he tell you anything in regard to his experience in sinking shafts?

Mr. JENNINGS.—That is just as leading.

COURT.—Overruled.

Q. Did Joe Leon tell you anything about that?

A. I don't think so—I usually fight my own battles and I let him take care of himself.

Q. When he asked you for work state what he said about his experience in sinking shafts?

A. Yes; that is what I hired him for.

Q. Tell the jury what he said.

A. He asked me one day coming up the shaft and he said, "Do you need any men sinking that shaft?" I said, "No, not at present." "Well," he said, "I will come round again if I get chance to work on shaft." I said, "Have you ever worked on a shaft before?" "Yes," he said, "I have worked two different places." I said, "All right, you come around again." He asked me if I would give him a chance. I told him to come around again and I would put him to work some other place. And he worked twenty or twenty-five days on the same level.

Q. Do you know why he wanted to get work down in the shaft?

(Testimony of Albion Bartello.)

Mr. JENNINGS.—Objected to as incompetent, irrelevant and immaterial.

COURT.—Overruled.

Mr. JENNINGS.—Exception.

Mr. JENNINGS.—You were asked if you knew the reason—do you know?

A. Yes. They got more pay there.

Q. State whether or not there was any difference in the pay of men working in the shaft than in other places in the mine?

A. From two seventy-five to four and a quarter. That is all.

Recross-examination.

(By Mr. JENNINGS.)

Q. Sinking shafts is skilled work—you have to operate a machine drill there? A. Yes, sir.

Q. You say the pay is about four twenty-five?

A. That was the pay.

Q. What was Joe Leon getting?

A. Four twenty-five—four fifty, I believe, was paid at that time.

Q. Did you board him? A. No.

Q. He got board in addition to that?

A. I guess he did—I did not pay any attention to that. He had to look out for that.

(By Mr. CHENEY.)

Q. How was he in regard to strength?

A. Strong—pretty strong young man.

Q. A strong young man? A. Yes, sir.

That is all.

[Testimony of Robert A. Kinzie.]

ROBERT A. KINZIE, a witness called on behalf of the defendant, having been heretofore duly sworn, testified as follows:

Direct Examination.

Q. Please state your name.

A. Robert A. Kinzie.

Q. What is your occupation?

A. Superintendent of the Treadwell group of mines.

Q. You are a mining man, then, by occupation?

A. Yes, sir.

Q. How long have you been engaged in that business? A. Since 1897.

Q. State whether or not you have made any study of the mining business as a profession or science?

A. I have, yes, sir.

Q. Whereabouts?

A. In the University of California.

Q. Is there a school of mines there?

A. No.

Q. Did you take a mining course there?

A. I took part of a mining course.

Q. Then what did you do in that line?

A. After I left college?

Q. Yes. A. I went with Ross E. Brown.

Q. Who was Ross E. Brown?

A. A mining-engineer in San Francisco—consulting mining engineer.

Q. What was you doing while with Mr. Brown?

(Testimony of Robert A. Kinzie.)

A. I assisted Mr. Brown in the examination of mines.

Q. How long were you with him?

A. When I first went with him about a year—a year and a half.

Q. Then where did you go?

A. After leaving Mr. Brown I started out for myself.

Q. What experience did you have while you were working for yourself?

A. Why, I was surveying for the Great Eastern quicksilver mine.

Q. Where is that? A. In California.

Q. How long were you at that mine?

Q. I was only at the mine—I would leave the office and go up to the mine every three or four days and then go back and in the mean time do the other work. At the same time getting out drawings for the Unida mine in California.

Q. After you left that mine where did you go?

A. I was with Mr. Brown again. For a while I was also with F. W. Bradley.

Q. State what experience you had with them on this occasion?

A. General work of mining—examining mines, principally. The rest of the time designing plans for mining work, principally mechanical work.

Q. Then where did you go?

A. Well, I did not leave Mr. Bradley but I went to the Bunker Hill and Sullivan mine.

(Testimony of Robert A. Kinzie.)

Q. In Idaho? A. Yes, sir.

Q. What were you doing there?

A. Constructing a tunnel from the level of the river and tapping the mine—also construction work around the plant.

Q. What sort of a plant was it?

A. This was a mining plant—concentrator.

Q. Where else have you had any experience?

A. From there I went to Mexico. I did not go direct to Mexico. I went back to school—then went to work in a gravel mine and had general charge of that mine. Also done some surveying for the Great Eastern in the meantime. Then I went down to Mexico—down to the Esperanto mine—then from Mexico back to the Great Eastern mine. About that time the Bunker Hill mill was built and then I went back to San Francisco and then went back to Mexico. Then I took charge of the Harker's Marie mine. I was there practically three years most of the time.

Q. You was in charge?

A. Yes, sir—most of the time for one or the other of these men.

Q. Working for them?

A. Yes, in charge for them. From there I came up here as assistant superintendent of the Treadwell mine.

Q. How long were you assistant superintendent?

A. About four years.

Q. And then you were appointed general superintendent? A. Yes, sir.

(Testimony of Robert A. Kinzie.)

Q. And have held that position ever since?

A. Yes, sir.

Q. In your study and experience as a mining man do you know anything about hoisting machinery?

A. I do, yes, sir.

Q. The construction of bulkheads?

A. Yes, sir.

Q. Ever made a study of the tensile strength of cables, wire cables that are on the market as to their strength? A. I have done so; yes, sir.

Q. State whether or not that is part of the business of a mine superintendent?

A. It is part of it; yes, sir.

Q. State whether or not that is a part of the qualifications of a mining superintendent?

A. It is; yes, sir.

Q. Were you employed at the Treadwell mine in the month of August, 1903? A. I was; yes, sir.

Q. Do you know the sheave-wheel which was in use in the hoisting department of the main shaft of the Treadwell mine? A. I do.

Q. I believe you stated that it was a steel wheel?

A. Yes, sir.

Mr. JENNINGS.—We object to that—he did not say any such thing.

Q. I will ask you if you stated the other day what sort of a wheel that was?

A. I think I was asked that question.

Q. What sort of material was it made of?

A. I said, to the best of my knowledge, it was a steel wheel.

(Testimony of Robert A. Kinzie.)

Q. Did you see the wheel after it was broken in the accident—at the time of the accident?

A. I did; yes, sir.

Q. Describe to the jury that sort of fracture there was in it—whether it was a recent or an old fracture?

A. It was a recent fracture.

Q. How soon after the break did you see the fracture?

A. Well, either the night of the 5th or the morning of the 6th.

Q. Not more than twenty or twenty-five hours after the accident, or something like that?

A. About that; yes, sir.

Q. I will ask you, Mr. Kinzie, if in judging of the material of which a casting is composed if it is any assistance in determining that question whether or not there is a recent fracture to be examined?

A. It is very important.

Q. State whether or not it is possible to tell with the naked eye from the outside of a casting such as a piece of cast machinery as to what material it was composed of?

A. I do not think so—I cannot do it.

Q. State what examination you made of this fracture? A. The fracture of the wheel?

Q. Yes.

A. I was naturally very much interested in that very point as to whether it was an old crack or anything that could have caused the accident, and I naturally examined it very closely both as to the

(Testimony of Robert A. Kinzie.)

grain of the iron and as to whether there was an old break or anything of that sort. The examination I made was simply by the eye as to whether it was a new break or an old break and as to the character of the material of which it was composed.

Q. Tell the jury what conclusion you reached.

A. It was very evident to me that it was a break and—

Mr. JENNINGS.—We object to his saying it was evident.

COURT.—Overruled. He is only stating his opinion about it from the facts that appeared to him.

Mr. JENNINGS.—Except.

Q. Go ahead.

A. As I said from the examination of the break it was very evident to me that it was a new break—that it was a recent break. The next thing that would be of interest—that was of interest to me at the time was the character of the material—to see if there was any blow-holes or any segregation of the metal or an excess of carbon which very often forms spongy masses in the casting. I did not see anything of the sort and judging from the fracture. And with the eye alone I concluded—

Mr. JENNINGS.—We object to his going into the quality of the metal. He was asked what he saw.

Q. State what conclusion you came to in regard to the material from the fracture itself?

Mr. JENNINGS.—We object to that as incompetent, irrelevant and immaterial.

(Testimony of Robert A. Kinzie.)

COURT.—Overruled and exception allowed.

A. I concluded from the examination of the wheel was that it was a casting known as cast steel.

Q. Have you had occasion in the course of your study and experience, to find out and ascertain the weight such a wheel is calculated to bear—what weight it is represented by the manufacturer as being able to stand, the capacity of that wheel what weight it is sustain? A. I have.

Q. State to the jury what that capacity is.

A. The capacity of the wheel?

Mr. JENNINGS.—We object to that. It is shown in the evidence that the wheel was patched and the wheel the witness is now speaking of is the new wheel what it is represented by the manufacturers as to what weight the wheel would sustain.

COURT.—Objection overruled.

Q. State what its capacity is. The safe capacity of a wheel of that description?

A. Between two and four hundred tons.

Q. What would be a safe load upon it?

A. One-half of the breaking strain would be a safe load and I would say a quarter would be a safe working load.

Mr. JENNINGS.—I understood you to say a safe load; you mean a breaking load?

A. A breaking load.

Mr. JENNINGS.—What would be the safe working load?

A. Anywhere from one-half to one-quarter of that.

(Testimony of Robert A. Kinzie.)

Q. In the course of your experience and study, state whether or not you know approximately the amount or extent to which a wheel of that sort would be weakened, if any, by being repaired in the way this wheel was repaired?

Mr. JENNINGS.—We object to it unless he explains the condition of the wheel.

Q. A piece is broken out of one flange from four to eight inches in length and extending something like two inches in depth but above the top of the cable as it lay in the groove. The piece broken out is replaced in the flange so as to fit smooth and a piece of boiler iron or sheet steel or some suitable material of that sort several inches longer than the break is put on the outside of the flange and riveted on solid. These rivets countersunk on the inside so as to make it as smooth as it was before. To what extent, if any, would that sort of a repair on a wheel affect its capacity?

A. Its carrying capacity?

Q. Yes.

A. None whatever on the carrying capacity.

Q. Would it affect it in any way as to its safety for use in hoisting? A. I think not.

Mr. COBB.—Now, I want to make, if the Court please, I want to next take up the question of repairing the flange and I would rather not start until after lunch.

COURT.—Do you desire to adjourn at this time?

Mr. COBB.—I would like to.

(Testimony of W. C. Angell.)

COURT.—Gentlemen of the Jury, it lacks only a few minutes of twelve o'clock and Court will take a recess at this time until 1:30. In the meantime you will remember the admonition heretofore given you by the Court not to talk to any one about this case nor to permit any one to talk to you, and if any person should attempt to do so, you should report the matter to the Court.

Court will be at recess until 1:30.

[Testimony of W. C. Angell.]

W. C. ANGELL, a witness heretofore called on behalf of the plaintiff, was recalled for further cross-examination and testified as follows:

Further Cross-examination.

(By Mr. COBB.)

Q. I understand you stated to the jury that you could tell by the eye alone whether a given piece of casting was iron or steel, did you?

A. I did not say a given piece. I said I could tell the difference between a cast iron and cast-steel sheave-wheel.

Q. You could tell then?

A. If it is an ordinary piece of machinery I could.

Q. How is that?

A. If it is a piece of machinery that I am familiar with.

Q. You are familiar with machinery?

A. All parts of mining machinery.

Q. It would not make any difference in the metal what kind of machinery it was?

(Testimony of W. C. Angell.)

A. Not if it was cast in the same sort of mould.

Q. Do you mean to state that you could not tell from the appearance of the metal itself?

A. No, sir, the process of moulding would have to be taken into consideration.

Q. Do I understand that you cannot tell the difference between two pieces of metal whether or not they are cast iron or steel unless you are familiar with the manner of moulding.

A. No, sir, I did not state that.

Q. Just by the eye? A. Yes, sir.

Q. If there is a fresh fracture so you can see the grain, what then?

A. Yes, certainly that would be another test.

Q. That would be necessary? A. No, sir.

Q. Well, suppose you have a new fracture already made a fresh break, could you tell better then?

A. That would be corroborative evidence.

Q. It would be a good test?

A. It would confirm my first impression.

Q. It would be easier to tell by examining a break than it is by its outside appearance?

A. They are both equal tests to me.

Q. Both equal tests? A. Yes, sir.

Q. One no better than the other? A. No.

Q. Now, I will exhibit to you a piece of metal in which the grain is all exposed freshly, exposed so that you can see the grain of the metal; can you tell what that is?

A. It is not an ordinary piece of casting right from the mould.

(Testimony of W. C. Angell.)

Q. There is a fracture in it?

A. There is a piece broken off from the side here.

Q. It is just an ordinary old break?

A. No, sir, that break is disguised.

Q. Do you tell the jury that break is disguised?

A. Yes, sir.

Q. It has simply been ground down to show the grain; can you tell what it is?

A. It is not cast as it came from the mould.

Q. Can you state what it is?

A. No, sir, and no other man that ever saw it before.

Q. I exhibit to you another piece of metal ground down on three sides to show the grain of the metal and a fresh fracture on two ends; I will ask you if you know what that is.

A. No, sir. Yes, sir, I know what that is—that is not casting.

Q. What is it?

A. That is what we call machine steel.

Q. You are positive of that? A. Yes, sir.

Mr. COBB.—We offer these in evidence. The first will be E and the second F.

COURT.—They may be admitted.

(Marked Defendant's Exhibits "E" and "F.")

A. The one marked F, the last piece I looked at, was machine steel and not a casting at all.

Q. I will exhibit to you another piece of metal showing a fracture and the grain—ground down showing and exposing the grain of the metal and ask you if you know what that is?

(Testimony of W. C. Angell.)

A. That piece is disguised so that there is nothing left—no one can tell what it is.

Q. Answer the question.

COURT.—He has.

Mr. COBB.—I will show it to the jury so that they may examine it.

Mr. JENNINGS.—We object until you offer it in evidence.

COURT.—Wait until it is offered in evidence.

(Marked Defendant's Exhibit "G.")

Q. Now, I will exhibit to you another piece of metal with a fresh fracture ground so as to expose the grain of the metal and ask you what it is.

A. That is cast iron—no steel in it.

Mr. COBB.—I ask to have that marked.

COURT.—It may be admitted.

(Marked Defendant's Exhibit No. "H.")

Q. What do you say it is?

A. I say it is a form of cast iron; no steel in it.

Q. No steel in it?

A. There might be a very little steel in it.

Q. Would you say there was no steel in it?

A. There might be some steel in it, but it does not show by the grain.

Q. Does it show in the fracture?

A. The fracture shows that there might be some steel in it. It is considered cast iron even if there is some steel in it.

Q. That is what you meant when you said this was cast iron? A. Not necessarily.

(Testimony of W. C. Angell.)

Q. Was there any fracture on the wheel?

A. There was no fracture on the casting.

Q. Could you not tell, an expert like you, that there is steel in that.

A. I could tell whether it was a steel casting or an iron casting.

Q. Could you tell whether there was any steel in it?

A. Whether there was any steel in it?

Q. What is it—whether you know or not. Answer my question. A. Ask it again.

Q. Do you know whether or not this is cast iron?

A. It is cast iron and it might have some steel—a small portion of steel in it.

Q. Do you know whether it has or not?

A. I am not positively certain.

Q. Do you think there is?

A. I think there is, but I am not positively certain.

Q. That is the best answer you can give?

A. To that question, yes, sir.

Q. I will show you another piece of metal and ask you what it is.

A. That does not show the grain of the metal at all.

Q. I would like to know where you see the grain, if at all?

A. No, there is no grain of the metal exposed.

Q. Do you know what it is?

A. No, sir, I do not.

(Testimony of W. C. Angell.)

Mr. COBB.—I ask to have that marked.

COURT.—It may be marked.

(Marked Defendant's Exhibit "I.")

Q. You don't know what that is?

A. That last piece of metal—it is disguised so that it is impossible to tell.

Q. Answer my question.

A. No, sir, I do not.

Q. I exhibit to you another piece of metal and ask you if you know what that is?

A. This is neither cast iron or steel. I don't know what it is.

Q. It is neither cast iron or cast steel and you don't know what it is?

Mr. COBB.—I ask to have that marked.

(Marked Defendant's "J.")

Q. I exhibit to you another piece of metal and ask you what it is.

A. This is disguised so that you cannot tell what it is.

Q. You don't know what it is?

A. No, sir, it is disguised.

Q. You can't tell what it is unless there is a fresh fracture? A. Not on that piece.

Mr. COBB.—I ask to have that marked.

(Marked Defendant's "K.")

Mr. JENNINGS.—I submit that just showing a piece of metal, a small piece like that, is not a proper way to test his ability to tell whether a six-foot wheel is made of cast-iron or cast-steel.

(Testimony of W. C. Angell.)

COURT.—The jury may consider all the circumstances and take the testimony for what it is worth. It is some evidence before the jury.

Q. You do not know what the last is—K?

A. No, sir, I do not.

Q. I exhibit to you another piece of metal and ask you what it is. There is a fracture on that?

A. That is not a fresh fracture there.

Q. Do you know what it is?

A. No, sir; it is disguised so that I cannot tell what it is.

Mr. COBB.—I ask to have that marked.

(Marked Defendant's "L.")

Q. I hand you another piece of metal and ask you if you know what that is?

A. There is no fracture there.

Q. I did not say anything about fractures; I asked you if you knew what it was? A. No, sir.

A. No, sir, I do not.

Mr. COBB.—I ask to have that marked.

(Marked Defendant's "M.")

Q. I hand you another piece of metal and ask you if you know what that is? A. No, sir.

Q. There is a fracture there?

A. Neither iron or steel.

Mr. COBB.—I ask to have that marked.

(Marked Defendant's "N.")

Q. You do not know what "N" is?

A. The last piece you showed me?

Q. Yes. A. No.

(Testimony of W. C. Angell.)

Q. Do you know what this is—I hand you another piece of metal?

A. It is absolutely impossible to tell about that.

Mr. COBB.—I ask to have that marked.

(Marked Defendant's "O.")

Q. Now, you have been able to recognize one piece of metal of all these and tell what it is?

A. Yes, sir.

Q. And each one of them was ground down to show the grain of the metal?

A. It was ground down to disguise it.

Q. I am not asking you what it was done for or anything about that. I am asking you if it is ground down so that you can see the metal expose it; is that a fact? A. Certainly shows the metal; yes, sir.

That is all.

Mr. JENNINGS.—Do you care to say anything about the exhibits shown to you—do you care to make any statement to the jury?

WITNESS.—I do not know how the question is intended.

COURT.—Answer yes or not.

WITNESS.—No, sir, I do not.

That is all.

[Testimony of Robert A. Kinzie.]

ROBERT A. KINZIE, a witness heretofore called on behalf of the defendant, resumed the stand for further direct examination.

Further Direct Examination.

(By Mr. COBB.)

Q. Mr. Kinzie, in the course of your study and experience in mining have you made a study or had any experience with bulkheads and shafts in mines?

A. I have; yes, sir.

Q. Give the jury—I mean explain the experience you have had in that kind of work.

A. Do you mean by that question the number of bulkheads I have seen or installed?

Q. Just in a general way.

A. During the time I was with Mr. Brown and Mr. Bradley and others our business took us from one mine to another—we usually spent all the way from four or five days to a month or two months at a mine, and as it happened in my case most of the mines where I went were large mines and I should say out of the twenty large mines that I saw I should judge that fully one-half had bulkheads in the shafts at various distances and in two of them bulkheads were installed during the time I was there.

Q. Have you made any study of the subject of bulkheads in the course of your mining experience?

A. Theoretical study?

Q. Yes. A. Yes, sir.

Q. Now, from your experience do you know what is a proper and reasonably safe bulkhead such as

(Testimony of Robert A. Kinzie.)

would be considered ordinarily a reasonably safe bulkhead in the operation of a mine?

A. I do; yes, sir.

Q. Do you know what sort of a bulkhead was in use in the main shaft of the Treadwell mine at the 750-foot level on the 5th of August, 1903?

A. Yes, sir.

Q. Just describe that bulkhead to the jury.

A. The bulkhead at the 750-foot level of the No. 2 shaft of the Treadwell mine consisted of six 12x12 timbers—three in each compartment. In this bulkhead the timbers were bolted together—that is three were—three pieces 12x12 were bolted together and inclined at an angle of forty-five degrees. The direction of the angle being toward the station of the 750-foot level. The bottom of the timbers rested in a hitch cut, I should say, from twelve to fourteen inches into the solid rock on the east side of the shaft—the side toward the station at the 750-foot level.

Q. Where were they hitched in reference to the floor of the station?

Q. Into the floor of the station so that the bottom of the timbers would be—that is, so top of the timbers would be flush with the floor of the station set in solid rock at the station level. The upper end of the bulkhead was set in hitches. The flat side, the lower side of the hitch in that case would be at an angle—from ten or twelve inches. The upper end—the part which the end of the timbers butted against would be

(Testimony of Robert A. Kinzie.)

pretty hard to say average eight or ten inches in some cases, maybe more in others, so that the bulkhead when put in place rested on the hitch on the west side of the shaft.

Mr. JENNINGS.—We object to that repetition.

COURT.—It was gone into very briefly at that time, and he may go into it now to cover such points as were not covered before.

Mr. COBB.—I am only trying to cover such points as were not gone into and will only go into it far enough to get it connected.

COURT.—Make it as brief as possible.

Q. What kind of timber was used in that bulkhead? A. It is known as Oregon fir.

Q. Is that the best timber that can be obtained in this country?

Mr. JENNINGS.—Objected to as leading.

Q. I will withdraw it. State how that timber compares with other timber which can be obtained on this coast for the purpose of constructing bulkheads in mines?

A. For the general use of bulkheads it is better than Alaska spruce or hemlock. I do not think it is better than hemlock, but it is as good or better than any other timber we can get on the coast in commercial quantities.

Q. Is that the sort of bulkhead that men of experience in mines and in the mining world would consider a reasonably safe and sufficient bulkhead for the purpose for which it was intended?

(Testimony of Robert A. Kinzie.)

Mr. JENNINGS.—Objected to as leading.

COURT.—Overruled.

A. It was so considered.

Q. Is it such a bulkhead as is commonly used?

A. That particular style of bulkhead?

Q. Yes.

A. Well, on a smaller scale it is a very common bulkhead—the only bulkhead that I have had anything personally to do with of the same kind was the Hatris Milore mine in Mexico, and that was made of native lumber, native timber, and smaller, consisting of four timbers single compartment a smaller shaft. That shaft was about 60 or 650 feet—the bulkhead was put in at that level.

Q. State whether or not this kind of a bulkhead is in common use in the mining world?

A. They are in common use; yes, sir.

Q. Now, I want you to explain the purpose of putting the bulkhead on an incline?

A. The object was that if any body of any material falling down the shaft it would render the bulkhead itself stronger than if it was in a horizontal position and also to deflect any material falling down the shaft into the station at the seven hundred and fifty foot level.

Q. Mr. Taylor has given his deposition in this case—do you know Mr. Taylor?

A. I do; yes, sir.

Q. Where did you know him?

A. I knew him as a carpenter at Treadwell.

(Testimony of Robert A. Kinzie.)

Q. How long did he stay there?

A. I could not say.

Q. Mr. Taylor has given some figures to the effect that a skip falling six hundred feet and weighing a little over 10,000 pounds would develop a strain of six million pounds; what have you to say about that calculation? A. Please state that again.

Mr. JENNINGS.—We object to that as not the correct proposition.

Q. Well, I will change it to 10,500 pounds falling 650 feet—would develop a weight of something like six millions of pounds?

Mr. JENNINGS.—If he is asking that question for impeachment he ought to be required to state the proposition exactly.

COURT.—State the proposition as nearly as you can in the language of the other witness.

Q. I will get the deposition of Mr. Taylor. I was trying to state it from memory, and I thought I had it substantially correct. I have found it now upon page fourteen of Mr. Taylor's deposition. He states that a weight of 10,500 pounds dropped a distance of 650 feet would develop a force of impact of something over six million pounds.

A. I do not know just what he means.

Q. Six million pounds; what do you think of it?

A. I would not say positively. The problem stated indicated varies so greatly—there are so many different factors to compute and parts of the formula coming in that I doubt very much if you could state

(Testimony of Robert A. Kinzie.)

it as impact, and if you did state the impact you would have to compute so many different factors to get it into pounds.

Q. Can it be expressed in pound weight at all?

A. No, it cannot.

Q. Is there any weight measurements which fit it?

A. No, there are not any weight measurements.

Q. How is it measured then?

A. There are foot pounds and horse-power or something of that nature which would take up both weight and velocity.

Q. Now, there is one question which I omitted to ask you. You described the other day this skip and mentioned something about some clutches upon it—described it to the jury. A. Yes, sir.

Q. I will ask you if those clutches would in any way enter into the problem?

A. Why, certainly, one of the most important parts of it. If you are considering impact that is very important—the velocity in falling and accelerated velocity and if you bring into the question the question of friction you have another factor. Any friction would change the problem entirely.

Q. This skip had dogs or clutches on it?

A. Yes, sir; four dogs.

Q. What are the purpose of those dogs or clutches?

A. To break the force of the fall of the skip and to stop it.

(Testimony of Robert A. Kinzie.)

Q. I will ask you if those dogs were the best that could be procured.

Mr. JENNINGS.—We object to that.

COURT.—Overruled.

A. They are considered the best safety clutch in general use at the present time. There are different kinds, but I know of three leading manufacturers who use them.

Q. Have you ever made any tests with them?

A. Yes, sir.

Q. Tell the jury what they were.

A. The test was made on two different occasions. In the first test—

Mr. JENNINGS.—Are you talking of this particular clutch?

A. This particular style of clutch.

Mr. JENNINGS.—This is not the particular clutch that was in use at that time, and I do not think that any test of any other clutch has any bearing on this case.

COURT.—If he made a test with that clutch on that skip and under the same identical circumstances, and under such circumstances applied to that condition, he can testify about it. The objection will be overruled.

Mr. JENNINGS.—How long before the accident occurred?

A. I did not understand your question.

Q. What time was that test made—the test you speak of with those clutches?

A. There were two tests.

(Testimony of Robert A. Kinzie.)

Q. What time was the first one made?

A. The first test was made—it must be about nine years now.

Q. And the last?

A. The last test was made just after I came here. After I came to Treadwell. The tests were identical in both cases. The first test was a manufacturer's test. The tests consisted of the same circumstances in each case. In each case the skip was hoisted to the collar of the shaft and some timbers put under it to hold it in position. The rope was slacked up and the clevis removed and the rope taken out. The rope was then brought up again a distance I should say of about eight feet. A loop was made in the rope and the clevis put back again and the rope attached to the yoke. When that was made fast the skip was hoisted up from the sleeper timbers that had been placed underneath it. The timbers were then removed and the rope cut. In that test they used a four yarn rope and it was cut with a broad ax, and in that case the skip dropped something like twelve or fourteen feet. The skip brought the dogs or clutches into action immediately, and stopped the skip. Brought it to a dead stop within about twelve or fourteen feet. In the other test which was made in what is known as the manway or man-compartment of the number two shaft at Treadwell. At that time a skip was used in that compartment also, where at the present time there is a cage. A skip was then used for lowering the men and an identical test was

(Testimony of Robert A. Kinzie.)

made there and in that case, if I remember correctly, the skip did not drop more than five or six feet. Anyway, by going down to the yoke of the frame where it was attached to the rope they got down and fastened it on without using a ladder.

Q. In making those tests was the skip loaded?

A. In regard to that there was ore in the skip, but I do not remember how much.

Q. Loaded with ore?

A. Partly loaded with ore.

Q. Now, you saw this shaft after the accident?

A. Yes, sir.

Q. Was there any indication there in the shaft to show that the dogs had worked the clutches?

A. In the shaft?

Q. Yes. A. Yes, sir; there were.

Q. Tell the jury about that.

A. The case in point—the guides, the wooden guides at the bottom of the shaft—the first place that I noticed it just below the skip shoot at the 450 foot level it showed where the rough portion of the dogs came into play against the guides. It cut right into it, and planed the wood away—it planed all that portion of the guides away and carried it on down; it made long fibers of wood—pulled it right out.

Q. What was the length of the piece of rope—if you know—which was still attached to the skip after the accident? A. I do not remember that.

Q. Do you remember approximately?

(Testimony of Robert A. Kinzie.)

A. From one hundred and fifty to two hundred feet, I should say, maybe more. I saw that rope when it was coiled up.

Q. Was there anything else in this shaft in the way of obstructions in it besides this bulkhead?

A. Yes, sir, there was.

Q. What was it?

A. At the skip shoot station on the 440 foot level there is what we called a loading chair. This chair was made of two pieces of sixty pound railroad iron bolted together that rested in a hitch so that when the skip came down it could be rested on that to assist in loading it?

Q. Anything else?

A. Next to that chair was the inclined bulkhead which I described at the 750-foot level and still below that—below the station at the 750 foot level was another platform—a horizontal platform made of six by ten timbers. That was put there for the purpose of catching the falling rock from the skip shoot—the rock which might be spilled in loading the skip at the 750-foot level.

Q. What else was there to catch the rock going down the shaft?

Q. What sort of rope was being used at that time?

A. Roebling one and one-eighth inch plow-steel rope.

Q. I believe that you stated that it was capable of sustaining a working load of twelve tons?

A. Yes, fully twelve tons.

(Testimony of Robert A. Kinzie.)

Q. What sort of weight of the skip and its load?

Mr. JENNINGS.—That was all gone into on his former cross-examination.

COURT.—Overruled.

A. An average load—from five to five and a half tons—that is the complete load, rope, skip and load of ore.

Q. One of the witness—Mr. Angell, I believe—testified that this sheave-wheel was a six foot sheave-wheel which was intended only for a two ton load; is that true? A. No, sir, it is not true.

Q. How large a load was that intended to carry a working load?

A. You mean a safe working load?

Q. Yes.

A. About a quarter of the breaking load or even less. Say the breaking load was from two hundred to four hundred tons, a quarter of that would be a safe working load or even a fifth.

Q. How much would you say—how many tons would you consider a safe load for that wheel?

A. I would not hesitate to use—I would not care to use anything higher than perhaps a total load of *eight to ton;* though, as I say, I would not hesitate to use at least a eight ton load on it.

Q. Now, Mr. Kinzie, I will ask you to explain to the jury fully all the precautions that the defendant company took to make that shaft a safe place to work. Explain to the jury in your own way what was done to make it a reasonably safe place to work of the occupation these men were engaged in?

(Testimony of Robert A. Kinzie.)

Q. Why the first thing that was done was to buy the best machinery that could be bought upon the market and also to buy it from what we considered the most reliable manufacturers of mining machinery and also to have it installed in a workmanlike manner. The precautions taken at the shaft, that is, leaving out the construction of the hoist, sheave and rope which have been gone into the first thing we tried to prevent was what is known as winding.

Q. What?

A. From winding—by that I mean is having the skip pull straight on the sheave-wheel. That is done by installing two timbers in every shaft—in every compartment so that when the skip reached a certain point in the gallis frame it would come in contact with those two timbers. These are fastened with long loose bolts so that if the engineer had taken the skip up too high or the accelerated motion of the skip was too great—that is, if he did not shut off the steam they would strike against these timbers—these two vertical pieces of timber, and that would give notice to the engineer to stop the engine before it had been raised far enough to do any damage. The next precaution taken was as I have already explained in using a safety devise or clutch on the frame of the skip so that if the rope parted or broke they would act upon the guides and either stop the skip from falling clear down the shaft or at the

(Testimony of Robert A. Kinzie.)

very least regard its motion. The chair, of course, is not considered in the sense of stopping the skip in case of an accident happening, but they would act to a certain extent in that connection of either stopping the skip or retarding the skip in case an accident did happen; it would have a tendency at least to retard it and in case the dogs were slipping give them a chance to work when it came in contact with those sixty pound rails. They would at least to some extent retard the skip—retard the motion of the skip in going down the shaft. The next obstruction in the shaft was the bulkhead at the 750-foot level. I believe that has been gone into fully. The next thing was this platform, which was for the purpose of catching any ore or rock or any other falling body such as a drill or monkey wrench or anything of that sort from falling through and striking the men working below. Then again at the bottom of the shaft there was not more than one half of the shaft that was directly under the hoisting compartment—I believe that is about all the precautions that were taken.

Q. What precautions, if any, were taken in regard to inspecting the machinery and keeping it in good repair?

A. We had very rigid rules on that point.

Q. Tell the jury what you did in that respect.

A. First the engineer coming on shift or going off shift. Sometimes it was one and sometimes it was the other were required to examine the sheave-wheel,

(Testimony of Robert A. Kinzie.)

the rope and machinery of the hoist the handling of which he had direct charge. The shift bosses, what is usually known as the assistant foreman, is on days and the head shift boss at night; it is his duty as often as possible and at least once a shift to go up and look over the machinery in the hoist—by that I mean both the clutches and the sheave and everything pertaining to it. Again the skipmen—those together with the ship bosses were responsible for the looking after of the clevises where the rope is doubled back and attached to the skip; that is known as the clevis. They were required to look over the rope after it had been in use a day or two or once in two or three days is sufficient, they have to inspect it throughly—once a week would be sufficient, they have to inspect it thoroughly—once a week would be sufficient.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. JENNINGS.)

Q. You are working for the Treadwell company?

A. I am working for the Treadwell company; yes, sir.

Q. You say the shift bosses were required to do so and so, and this man was required to do so and so, but you don't know whether they did it or not?

A. I do not.

Q. You say the men were working under the compartment—the men who had it arranged so that the men worked as little as possible directly under the compartment where the hoisting was going on?

(Testimony of Robert A. Kinzie.)

Q. Both then and now.

Q. You had the bulkhead and then about sixty feet below that you had another platform?

A. Yes, sir.

Q. That was made to catch the falling ore?

A. Yes, sir.

Q. And the shaft was timbered in between the lower platform and the bottom of the shaft?

A. No.

Q. No timber there?

A. No, the timbering did not extend to within forty or sixty feet of the bottom of the shaft.

Q. The bottom of the shaft was not divided into compartments? A. No.

Q. It was one large room? A. Yes, sir.

Q. How far up from the bottom of the shaft did the compartments partitions end?

A. Where the timbering began.

Q. So that if the bulkhead broke through and also through that lower platform anything might hit a man and kill him although he was not under the center of the shaft?

A. Such a thing could happen.

Q. You say this chair you spoke about was simply put there to rest the skip on—the skip came down and rested upon it during the process of loading. When the skip went up the chair was taken up? A. No.

Q. Hoisted up against the side of the wall?

A. No, it was not.

(Testimony of Robert A. Kinzie.)

Q. Didn't your company have a lawsuit about four years ago in which that was the cause of the accident that some of your men had left that chair down across the shaft when it should have been hoisted up?

Mr. COBB.—You cannot inquire into the conditions of that other lawsuit.

COURT.—He make inquiries about the conditions at the time of the accident fully or thereabouts to show whether they were following the general custom at that time.

A. No.

Q. Then you say it was not anybody's business and not the custom of the Treadwell mine to hoist the chair up against the side of the shaft after the skip was loaded and sent up?

A. It was not the custom.

Q. You left the chair down then?

A. Yes, while the hoisting from the level was going on.

Q. From that level? A. Yes, sir.

Q. Now, Mr. Kinzie, you say there were safety clutches on this skip?

A. Safety clutches, yes, sir.

Q. They did not work?

A. I think they did.

Q. They did not stop the skip?

A. They retarded it considerably, I think.

Q. Is it not one of the ordinary dangers of mining—that the skips fall down the shafts?

(Testimony of Robert A. Kinzie.)

A. Unfortunately they do.

Q. Is it quite an ordinary accident?

A. It is one of the most frequent accidents.

Q. You know of similar accidents happening before? A. I have.

Q. Skips falling? Yes, sir.

Q. It also happens that the dogs do not work?

A. I have known such things to happen; yes, sir.

Q. That is one of the dangers of mining?

A. That is one of the dangers; yes, sir.

Q. Well, now, Mr. Kinzie, considering that it is quite a common occurrence for the dogs not to work and for the skips to fall, don't you think you ought to have had a stronger and better bulkhead

A. I do not think it was a common occurrence.

Q. It often happens?

A. It does happen.

Q. It is one of the dangers to be avoided?

A. Yes, sir.

Q. Considering that it was one of the dangers to be avoided, and that you so considered it, don't you think you ought to have had a better bulkhead in that shaft while the men were working at the bottom of that shaft.

A. We considered it a very good bulkhead.

Q. You considered it so?

A. We certainly did.

Q. One of the precautions was to buy the best machinery possible? A. Yes, sir.

Q. That sheave-wheel was put up along before you came up here?

(Testimony of Robert A. Kinzie.)

A. It was up before I came up here?

Q. That was bought of Frazier and Chalmers—are they the best manufacturers that you know of?

A. They were then, yes, sir.

Q. Are they still in that business?

A. Not now; they are combined in another concern. A. A combination?

A. Yes, sir.

Q. This bulkhead was not built or intended or contemplated to stop a falling skip?

A. It certainly was; yes, sir.

Q. Do you mean to state to this jury as a mining man that it was a reasonably safe devise to stop a falling skip if the clutches did not work?

A. I do.

Q. You do? A. I do.

Q. Did you ever compute the strength of that bulkhead?

A. I had not before that time but I have since.

Q. Have you those figures with you?

A. No.

Q. Do you remember what you figured it to be?

A. I do not remember now.

Q. If I should give you the tables can you compute it?

A. No, it is very intricate calculation.

Q. What would you have to know?

A. You would have to know the weight of the falling object.

Q. You would not have to know the weight of the falling object. I asked you to tell me the breaking strength of the bulkhead?

(Testimony of Robert A. Kinzie.)

A. I certainly could do that.

Q. You could if I would give you the tables?

A. I can do it, yes, sir.

Q. I will ask you what you would have to know—you said it would be a difficult problem?

A In the first place, you would have to know the size of the timber?

Q. You know that, if you will give me the answer.

A. You would have to know the span of the timbers between rests.

Q. You know that, don't you?

A. I do, yes, sir; then you would have to know whether the timbers were horizontal or at an incline, at what angle it was placed?

Q. You know that?

A. I think I do. You would have to know whether it was seasoned lumber or green.

Q. You know that?

A. I am not positive on that point.

Q. You know whether you had seasoned lumber or unseasoned lumber?

A. No, I could not state that definitely.

Q. Did you take particular pains to see that it was made of good, hard, seasoned lumber?

A. It was the best lumber we could buy.

Q. You said it was the best lumber of that kind?

A. Yes, sir. You would have to know, furthermore, the elasticity of the lumber—that would have to be found by calculation, the limit of elasticity—that could be found by calculation and figuring.

(Testimony of Robert A. Kinzie.)

Q. Could you tell that?

A. I could find out.

Q. Have you ever found that out?

A. I figured it once.

Q. Then you did find out once?

A. Yes, sir.

Q. Don't you know what it is now?

A. I do not.

Q. How can you find out?

A. I figured it out.

Q. You can figure it again?

A. Yes, sir. Furthermore, you would have to know two or three factors. You would have to know, in the first place, the distance from the end of the timber at which the strain was placed. You would have to know the position of the timbers from the horizontal and get the rupturing point of the timber and get the coefficiency and elasticity of the timber. That can be done also and from that you would figure the amount—furthermore, in a problem of this kind where the timber is placed at an angle of forty-five degrees it makes it much simpler because the facts would be broken up into two component parts. The length of the timbers and the size and angle.

Q. You would have to know all those things?

A. Yes, sir.

Q. It was too much for you and Joe McDonald to figure out—it was too much trouble for you to figure that out? A. No.

Q. You did not figure it out? A. No.

(Testimony of Robert A. Kinzie.)

Q. Do you mean to tell this jury that you would have to know all these things in order to find out the breaking strain of three timbers twelve by fourteen inches inclined at an angle of forty-five degrees?

A. I certainly do.

Q. Do you mean to say that you would have to have them all?

A. To do it accurately; yes, sir.

Q. Do you mean to tell me that there are not engineering formulas by which you can find out just exactly what the breaking strength of three timbers twelve by fourteen put across a mine at an angle of forty-five degrees—the breaking strain of that many timbers?

A. There are, certainly.

Q. You don't have to have all those different things to do that?

A. You have to know the different factors.

Q. You can look at Troutline and find out the breaking strength of timber?

A. You can find out approximately.

Q. Troutline was in favor of safety?

A. He was.

Q. It is a standard among mining men?

A. Among civil engineers; yes, sir.

Q. If you knew how much the breaking strength of one timber put across there horizontally was you could tell just how much it would take to break three placed at an angle of forty-five degrees?

A. No, your question is entirely wrong; you could not.

(Testimony of Robert A. Kinzie.)

Q. It would be just twice as much, would it not?

A. You have stated the problem entirely wrong.

Q. Mr. Kinzie, I hand you a small book and ask you what it is.

A. It seems to be Molesworth's Pocket-Book of Engineering Formulae.

Q. First of all, I hand you Troutline's engineering book on the strength of timbers and call your attention to page five hundred—just look at that a minute.

A. I cannot see that five hundred—

Q. You don't need to look at anything else there? A. That is down here on page 499.

Q. You find there a table of the breaking strength of timber?

A. I find the crushing strength of timber—the crushing load.

Q. What is that there?

A. The safe quiescence load of timber placed across a shaft horizontally.

Q. Just read that at the top and that will tell you what it is.

A. That is the quiescence load.

Q. That is the safe load?

A. It is a quiescence load.

Q. A live load a sudden blow would be greater, it would take less load if it was a sudden blow than if it was a steady weight?

A. That condition would depend entirely upon how the load was applied; this is a uniform quiescence load and it is an entirely different problem.

(Testimony of Robert A. Kinzie.)

Q. The strain would not possibly be any less?

A. No, it would be greater.

Q. It would not be less?

A. It would all depend on how it was applied.

Q. How this table is for a quiet load on horizontal timbers supported at each end by a one-inch support and the load at the center? A. Yes, sir.

Q. You say that was Oregon fir?

A. Oregon fir.

Q. You knew Nels Nelson, the man who built it?

A. I do.

Q. You heard his deposition where he said it was Alaska spruce? A. I did.

Q. You know that Alaska spruce is not as strong as fir?

A. For some purposes it is stronger.

Q. For what purposes?

A. General mining purposes.

Q. In all cases?

A. In other cases it is not as good.

Q. Alaska spruce would bear even less weight?

A. Slightly less; yes, sir.

Q. Now, the breaking load of this timber is about one-sixth of the safe load? I am going to let you take the breaking load.

A. I do not care to take anything.

Q. You could take those figures and multiply them and get the result from that?

A. You mean in that book?

Q. Yes. A. It would apply to that table.

(Testimony of Robert A. Kinzie.)

Q. That is in a horizontal position?

A. Yes, but you must remember that you are stating an entirely different problem.

Q. Mr. Kinzie, after you have found out what the safe strength or breaking strength of timber—three timbers twelve by twelve laid across a shaft horizontally, you can then take and find out what it would be if the timbers were laid at an angle?

A. No, sir.

Q. Do you mean to say that you can not do that?

A. You would have an entirely different problem and calculation to deal with.

Q. I will call your attention again to this book. The title I have read—I will read it. Pocket-Book of Useful Formulae and Memoranda for Civil and Mechanical Engineers, by Sir Guilford L. Molesworth, Knight Commander of the Order of the Indian Empire, Fellow of the University of Calcutta, Member of the Institution of Civil Engineers, and Henry Bridges Molesworth, Member of the Institution of Civil Engineers. Twenty-fourth Edition, Revised and Enlarged, and I call your attention to page 141, and tell me if you do not find there a very simple formulae for finding out what is the breaking strength of such timbers and any timber laid at an angle.

Mr. COBB.—We object to that. It is not shown that it is an accepted authority on the subject.

COURT.—Overruled.

Q. Now, Mr. Kinzie, I will ask you if you knew the breaking strength of a given timber laid horizon-

(Testimony of Robert A. Kinzie.)

tally, if you could tell what it would be if set at an angle. A. Any quiescence load; yes.

Q. Any quiescence load? A. Yes, sir.

Q. Then you could have computed that very easily?

A. No, sir, I could not have done so very easily.

Q. Do you mean to tell this jury that that bulkhead was constructed with any idea of stopping a falling skip?

A. I do, that is the reason it was put there.

Q. Was it not put there for the purpose of stopping tools and other objects that might accidentally fall down the shaft?

A. No, sir, the lower platform was put there for that purpose.

Q. It was put there to stop a falling skip or any other falling object?

A. Yes, sir, and the skip among other things.

Q. Of course you believed it strong enough to stop the skip? A. We so considered it.

Q. You wanted to make it strong enough to stop a falling skip?

A. We always considered that it was.

Q. Didn't you testify in the other trial that it was not designed to stop a falling skip at all?

A. I think not.

Q. You were asked on the trial of the case of Ole Linge—you were asked by Mr. Cobb the following question. "Counsel has asked you whether or not, the small—what he terms the small bulkhead—that

(Testimony of Robert A. Kinzie.)

is, the bulkhead of six by ten or six by twelve pieces, some sixty-four feet below the seven hundred and fifty foot level, was designed to stop the skip—will you please state to the jury whether the bulkhead at the seven hundred and fifty foot level was designed for that purpose. And you answered, "It was not designed for that particular purpose; no." Did you not testify that way in that case?

A. I cannot remember; it would be true if I did say so.

Q. It would be true? A. Yes, sir.

Q. Reading on further: "For what purpose was it designed?"

Answer: To stop any falling object that might come down the shaft." A. That is true also.

Q. You say—you testified that you tested these clutches of this form? A. Yes, sir.

Q. Once nine years ago and once pretty soon after you came up here?

A. Just after I came up.

Q. Since then have you tested them?

A. They are tested regularly; yes, sir.

Q. How do you know?

A. Because I have seen it done and have had it done myself.

Q. Didn't you testify that you did not know whether your men did it or not?

A. I certainly did know.

Q. How do you know?

A. I certainly would know—I would know it from their reports.

(Testimony of Robert A. Kinzie.)

Q. Who was the foreman of the mine?

A. Tom Noonan was at that time.

Q. The same man that went up there and saw this broken sheave-wheel and brought it down and had it patched?

A. He is the man that had immediate charge of it; yes, sir.

Q. Mr. Kinzie, you testified that that sheave-wheel was as good a wheel after it was repaired as before? A. As to sustaining weight, yes, sir.

Q. You did not consider that the boring of holes in this flange would injure it any?

A. No, sir.

Q. Did you consider that the boring of those rivet holes would weaken it any?

A. Positively no.

Q. Reduce the strength of it in any way?

A. To sustain a load put upon it, no.

Q. It would not affect it at all?

A. No, sir.

Q. Don't you know that boring rivot holes in a piece of cast iron or a piece of cast steel disturbs the composition of the metal and is liable to produce a strain in other parts of the wheel?

A. That is a question I cannot answer yes or no to.

Q. Don't you know that it is liable to produce an unlooked for strain—that if you want to bore a hole in a piece of cast iron you cannot tell anything about its liability to break? A. In cast iron?

Q. Yes.

(Testimony of Robert A. Kinzie.)

A. Under certain conditions, yes, and under others, no.

Q. In this instance—under those conditions?

A. What conditions?

Q. The conditions under which this wheel was repaired?

A. I have not said it was cast iron.

Q. I said a piece of cast iron?

A. Boring rivet holes—I do not think so.

Q. The counter-sinking of the rivets in those holes might?

A. It does not affect the metal at all.

Q. It affects the structure of the metal?

A. It does not set up any other strain or anything of that sort.

Q. But the boring of those rivet holes in this wheel might have produced some weakness, some unlooked for strain in other parts of the wheel?

A. Of course, it is possible, but not very likely.

Q. You said something to the effect, Mr. Kinzie, that when you examined that wheel the day after the accident about an old crack?

A. No, sir; I did not.

Q. Didn't you find any old crack?

A. I did not.

Q. Did you find any crack?

A. Crack—no.

Q. The wheel was cracked?

A. The wheel was broken.

Q. I thought you said it was an old crack?

(Testimony of Robert A. Kinzie.)

A. No, sir, I did not.

Q. You did not see any crack which might have caused the accident? A. I did not.

Q. You did not find anything during your inspection which led you to form an opinion as to what caused the break?

A. Caused the break—by the inspection of the parts of the wheel itself, I did not.

Q. You did not see any evidence of any flaw?

A. No, I did not.

Q. It was a good wheel originally?

A. Originally.

Q. A good skip? A. Yes, sir.

Q. A good rope? A. Yes, sir.

Q. You say when you bought you got the best machinery you could? A. Yes, sir.

Q. You put up a patched sheave-wheel and used it? A. Yes, sir.

Q. You considered that all necessary precautions were taken? A. I did.

Q. You put up a repaired sheave-wheel, though?

A. It was considered good at the time.

Q. You put up a bulkhead that fell through?

A. It did not fall through—it was broken through.

Q. Mr. Angell testified that this hoist when he installed that plant was—this sheave-wheel—it was for a two-ton skip, to carry a weight of two tons?

A. About the two ton part he is mistaken.

Q. He is mistaken? A. Yes, sir.

Q. You dispute him absolutely?

(Testimony of Robert A. Kinzie.)

A. Absolutely.

Q. Mr. Kinzie, you said—how much weight did you say was on that sheave-wheel?

A. On the sheave-wheel?

Q. Yes, sir.

A. I should judge—I could not state positively what the weight on that sheave-wheel was at the time—the usual and ordinary weight that would be on the sheave-wheel would probably be from five to five and a half tons.

Q. That is the weight on the sheave-wheel just the load attached to the cable—that is the only strain on the wheel?

A. No, there is another strain on the sheave-wheel.

Q. What is that?

A. That is due to the pull of the engine.

Q. You heard what Mr. Angell said?

A. Yes, sir.

Q. That was the pull on the engine—that was in addition to the weight of the skip?

A. Yes, but that entirely due to the strain of the engine.

Q. Then there must have been at least twice the five tons weight on that sheave-wheel?

A. No, sir, there was not.

Q. It would take five tons on the other side of the sheave-wheel just to balance it?

A. No, you do not understand the problem.

Q. That is not a fact then? A. No, sir.

(Testimony of Robert A. Kinzie.)

Q. What is the proposition, then—how much weight, just come down and tell the jury the actual tonnage on that wheel?

A. If I knew the speed at which they were hoisting the drop of the rope and the curve formed by the rope I could tell you, because when the sheave is in motion the force in the wheel itself tends to offset part of the load on the sheave—the effect is to neutralize the strain. You have a down load due to the speed and weight of the rope, you have also a factor due to the pull of the rope—the direct pull, the weight of the rope from the sheave to the engine and you also have a factor due to the speed of the wheel. I could not tell you the exact weight on the wheel.

Q. You say you never heard of Molesworth formulae? A. No, sir.

Q. You are positive you never heard of it?

A. Yes, sir.

Q. It is not considered a standard authority then?

A. I am not saying that—it is an English book and I do not know it.

Q. Mr. Kinzie, vou said that there was no way of telling what the force of impact of that falling skip would have been on that bulkhead?

A. No, I think it can be figured very closely.

Q. Would it be more or less than the momentum?

A. Momentum?

Q. Yes.

A. Momentum is a mathematical expression.

(Testimony of Robert A. Kinzie.)

Q. If you multiply the weight of a falling object by the velocity per second don't you get the momentum?

A. That is the definition of momentum.

Q. And if you knew the momentum of that skip you could find out what the force of impact was?

A. That is not the momentum.

Q. What does it mean?

A. That is, mass times velocity.

Q. I believe you said there was practically no friction between the guides and runners. That it was infinitestimal?

A. I did not say it was infinitestimal.

Q. I say you said on your direct examination when you were a witness for the plaintiff that there was very little friction between the guide and the runners? A. There was very little friction.

Q. Not enough to take into consideration?

A. No.

Q. They did not bind?

A. That is just the reason there was no friction there.

Q. And there was plenty of air chambers and levels for the air to escape and the resistance of the air—there could be no resistance there.

A. That is a large factor.

Q. Do you mean to say that if that skip was falling in that shaft the resistance of the air would be an important factor in determining the force of impact? A. Yes, sir.

(Testimony of Robert A. Kinzie.)

Q. This was a four or five compartment shaft?

A. Yes, sir.

Q. And between all the compartments except two it was open network of timber—plenty of places for the air to escape?

A. Between the different compartments there was timbering.

Q. But what I am trying to get at is that there was plenty of space and opportunity for the air in front of that falling skip to escape and the air made no appreciable resistance—there is no retarding of the momentum of that falling skip?

A. Yes, sir, there was. You would state that entirely different if you understood it. If you mean to say that air in that shaft did not retard the skip—it certainly did.

Q. It does retard it, you say?

A. It is a factor in the problem an important factor.

Q. Do you mean to say that the fall of an object through the open air is retarded by the air?

A. Not in a room of this size; no.

Q. If the skip was only four feet by six?

A. It would take up about nine-tenths of the compartment.

Q. But that is only one compartment?

A. One of the two compartments.

Q. There was only a network of timber between them, though?

A. There was a lagged wall between them.

(Testimony of Robert A. Kinzie.)

Q. The two compartments on one side of the shaft just a network of timber between them?

A. The two ore compartments were divided simply by timbers; yes, sir.

Q. The air could escape into these different levels?

A. Part of it could escape—no doubt about that.

Q. You do not consider that the resistance of the air should be taken into consideration?

A. I certainly do.

Q. It would be infinitestimal?

A. It would not be. Any man of ordinary experience would know that.

Q. Is that the reason that momentum would be decreased by the resistance of the air?

A. Momentum means, mass times velocity.

Q. That is not what I mean. I am asking you if the reason that you cannot compute the momentum of that falling skip is that you do not know the resistance of the air?

A. I could figure mass times velocity.

Q. I will ask you if it could not be figured out?

A. It could be.

COURT.—Is counsel of the opinion that this theoretical examination is very important in this case?

Mr. JENNINGS.—No, sir.

COURT.—Then I would make it as brief as possible.

(By Mr. CHENEY.)

Q. I want to ask you about those clutches. I believe you stated yesterday that this skip which was

(Testimony of Robert A. Kinzie.)

being used at the time of the accident were fitted with clutches? A. Yes, sir.

Q. They were four ton skips? A. Yes, sir.

Q. They were not made by any manufacturing concern?

A. No, made in our own machine shop.

Q. I believe you stated they were made a short time before may be a year before?

A. I think so.

Q. And prior to that time and from 1898 up to that time you had used the skip which had been purchased from other companies?

Mr. COBB.—Objected to as incompetent, irrelevant and immaterial. It makes no difference what they used in 1898. There is no question raised about the skip.

COURT.—What is the purpose.

Mr. CHENEY.—The purpose is to show that they made no test of those clutches on this skip.

COURT.—Make it brief.

Q. What do you mean by skip—the entire machinery including the frame?

Q. No, the bucket?

A. Yes, the buckets were purchased.

Q. It was installed in 1898? A. Yes, sir.

Q. These were made later on by your company?

A. Yes, sir.

Q. Now, the test you made of the clutch in Mexico nine years ago was not made with reference to skips of this kind?

(Testimony of Robert A. Kinzie.)

A. It was made identical—the same kind of skip.

Q. You are sure of that?

A. I know it perfectly well.

Q. You say a test was made at Treadwell soon after you arrived? A. Yes, sir.

Q. These tests were made on skips of this character? A. Yes, sir.

Q. I understand you only made two tests of that description?

A. I never go down in a skip without looking at the clutches.

Q. You made that number of tests?

A. Yes, sir.

Q. What I am trying to get at is you said you made two tests—one in Mexico and one over here at Treadwell with a falling skip?

A. A falling skip; yes, sir.

Q. The test you did make was made right after you came up here? A. Yes, sir.

Q. You never made any after these skips were manufactured by your company?

A. A similar test?

Q. Yes. A. No.

(By Mr. JENNINGS.)

Q. Where is that wheel now?

A. What wheel?

Q. The wheel that was broken in that accident?

A. The Lord knows. I don't.

Q. What was done with it?

A. Melted up in the foundry.

(Testimony of Robert A. Kinzie.)

Q. When did you melt it?

A. I think last summer. When was the last trial of this case?

Q. You are the witness. Do you know when that wheel was melted up?

A. I should say three or four months before the last trial.

Q. There had been one trial of the case?

A. There certainly had.

Q. You knew that the material that that wheel was made of would be a material fact in this case?

A. I knew it at the time of the trial and also before.

Q. You knew it might be wanted as evidence in the case?

A. No, sir; we kept it there during the whole of the first trial.

Q. What did you melt it up for?

A. Because we wanted to use it.

Q. Because you wanted to use it?

A. Yes, sir.

Q. You did not keep any part of it? You have not a single piece of it that you can identify, have you? A. No, I do not think there is.

Q. Not a single piece of it has been saved?

A. No; we kept it during the entire time of the first trial; you could have called for it if you wanted it.

Q. You were afraid if it was not disposed of it would get you into the penitentiary? A. No.

(Testimony of Robert A. Kinzie.)

Q. You had Tom Tatum all fixed to pack up and leave the country? A. No, sir.

Q. You were afraid of criminal prosecution?

A. We knew our neighbors.

Mr. COBB.—There is nothing of that kind and counsel knows it.

COURT.—Counsel ought not to make such remarks on either side. You should conduct the matter fairly and ask proper questions.

Q. You say you saw that wheel either the night of the 5th or the morning of the 6th?

A. I did; yes, sir.

Q. Didn't you testify at the last trial I only saw it once after it was repaired—I should say it was a month or six weeks before the accident. Didn't you testify that way in answer to that question?

A. Not in that way. I think the answer which you read is to a question you asked me. If I had seen the sheave-wheel after the accident and I said that I had seen it either early in the morning of August 6th or else the night of the 5th. That is, either the night of the accident or the next morning.

Q. Mr. Kinzie, this question on the other trial: "When did you do that first? Answer. On my first inspection of the plant, about, I should say, three or four days after I came here—I believe; I went through the mill. Question. When was the last time you ever did? Answer. I only saw it once, after it was repaired. I should say it was about a month or six weeks before the accident."

(Testimony of Robert A. Kinzie.)

A. I do not remember that I answered that way.

Q. Do you swear that you did not answer those questions in the same words which I read to you?

A. I am very positive I did not.

Q. Are you just as positive of that as of anything you have testified to? A. Absolutely sure.

That is all.

Redirect Examination.

(By Mr. COBB.)

Q. Counsel has asked you about melting up this wheel. I will ask you if that is what you do with all scraps in connection with the operation of the mine?

A. All material of that nature; yes, sir.

Q. Now, you say it was not done until three or four months after the first trial of the case of Ole Linge?

A. It was quite a while after the first trial.

Q. Is it not a fact that on the first trial there was no claim on the part of these gentlemen that this was a cast-iron wheel?

A. I could not say that; I do not remember.

Q. They had not discovered any Angell at that time? A. I don't know.

Q. They had not discovered Mr. Taylor?

A. I don't know.

That is all.

[Testimony of Tom Tatum.]

TOM TATUM, a witness heretofore called and duly sworn, being recalled on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. Please state your name.

A. Tom Tatum.

Q. Where do you reside?

A. Treadwell, Alaska.

Q. What is your occupation?

A. Stationary engineer.

Q. Where were you employed in the month of August, 1903?

A. Well, I was employed at the Treadwell mine—one of the three men running the Treadwell rock hoist.

Q. In that business state, if you know, of any rules of the company in regard to inspecting the machinery? A. Nothing, only what I was told.

Q. What instructions did you receive in reference to inspection?

A. We had instructions from the foreman to make an examination of the machinery, the rope and sheave in the top of the shaft-house every time we went off shift—each one of us three men.

Q. Did you obey these instructions?

A. I did.

Q. When was the last time you inspected this hoist prior to the morning of August 5th, 1903?

(Testimony of Tom Tatum.)

A. It was in the morning of the 4th at seven o'clock when I went off shift. I came on at eleven and worked until seven o'clock, and it was the morning before at seven o'clock.

Q. What condition did you find things?

A. Everything in good condition, all right.

Q. State what you found?

A. I found everything in good shape, in good condition so far as I could see.

Q. Did you discover anything indicating any danger? A. No, sir.

That is all.

Cross-examination.

(By Mr. JENNINGS.)

Q. You say you found everything in the usual condition? A. Yes, sir.

That is all.

[Testimony of William Strafford.]

WILLIAM STRAFFORD, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. Please state your name.

A. William Strafford.

Q. Where do you reside?

A. Treadwell, Alaska.

Q. What is your age? A. Sixty-five.

Q. What is your occupation?

(Testimony of William Strafford.)

A. A machinist.

Q. What kind of work on machinery have you had experience with? A. Almost all kinds.

Q. For how long a time?

A. About fifty years; a little over fifty years.

Q. State to the jury what experience you have had in mining machinery?

A. About seven years here in Treadwell and a couple of years in England.

Q. Nine years' experience in mining machinery?

A. Yes, sir.

Q. What other experience have you had?

A. Worked around stationary engines—all kinds of experience.

Q. How long have you been employed at the Treadwell mine? A. Seven years.

Q. Were you employed there in August, 1903?

A. Yes, sir.

Q. Do you remember the hoisting plant at the Treadwell mine?

Q. Do you remember seeing a six-foot sheave-wheel up there which was repaired?

A. Yes, sir.

Q. When; what time of the year?

A. In 1903, I do not know exactly the date—I did not keep an account of it.

Q. I will ask you if you remember about its being repaired?

A. I recall a sheave-wheel being repaired.

(Testimony of William Strafford.)

Q. Do you remember in June or July, 1903, of the sheave-wheel from the main hoist of the Treadwell mine being repaired?

Mr. JENNINGS.—We object to that as leading.

A. I remember it was about 1903, but I do not know the date.

Q. What sort of a repair was made—describe the sort of break that was in the wheel and the repair that was made. A. Describe what?

Q. Describe the repair that was made—what was done.

A. I know the man who did it and saw it done—it was that I called a first-class job.

Q. Describe to the jury what was needed to be done and what was done?

A. They replaced the piece which was broken out and put a piece of boiler plate on the outside.

Q. Where was it broken?

A. A piece was broken out of the flange of the sheave.

Q. Just describe to the jury the character of the piece which was broken out.

A. As near as I can remember a piece six or eight inches—a kind of a half-circle piece broken out of one side of the flange and it was replaced and fastened by rivets to a piece of boiler plate made to conform to the shape of the wheel.

Q. Do you know whether or not that was a proper way to repair a break of that character?

A. I know it was—I have seen dozens of such looking jobs.

(Testimony of William Strafford.)

Q. That is the usual and customary way?

A. That is the usual way to do it.

Q. In your experience as a machinist, have you had occasion to handle and use castings and cast steel? A. I have used lots of them.

Q. I will ask you from your experience as a machinist and ironworker using these castings and handling them if it is possible—if it is possible in your opinion for a man to tell a steel casting from an iron casting just from looking at a piece of machinery made from either of those metals?

A. Well, it might be if there was a fracture.

Q. No fracture at all?

A. No, he cannot tell. He cannot by a casual glance. He might by a very close examination.

Q. You think he might be able to tell by a very close examination.

A. If he was making a very close examination he could but by a cursory glance he cannot tell.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. JENNINGS.)

Q. If he goes up to it and examines it and handles it—if he has anything to do with the handling of it he can tell?

A. He can tell, of course, what it is if he works the metal. One metal works different from another.

Q. Mr. Cobb was trying to get you to fix the date and the answer you gave was as near as you can remember when the repair was made?

(Testimony of William Strafford.)

A. Yes, sir.

Q. You say you have seen dozens of such repairs made? A. Yes, sir.

Q. Where did you see dozens of such repairs made? A. At other places.

Q. What other places?

A. I could not tell you; all over the United States and England.

Q. You have been over seven years at Treadwell?

A. Yes, sir.

Q. You have a wife and family? A. Yes.

Q. How far was you from the man who was repairing this wheel while he was repairing it?

A. About ten feet.

Q. And from your place you say you could see what kind of a repair he was making?

A. Sometimes I walked close up to it—probably fifty times while he was doing the job.

Q. You was watching him to see that he did a good job?

A. I did not; I could generally see as I passed him.

Q. That has been four years ago?

A. Yes, sir.

That is all.

Redirect Examination.

(By Mr. COBB.)

Q. You say if he worked the wheel and examined it very carefully he could tell whether it was cast iron or cast steel.

(Testimony of William Strafford.)

A. If he wanted to take the trouble to take a file and cut a notch in it a little distance he could tell.

That is all.

Recross-examination.

Q. Who was the man who repaired that sheave-wheel?

A. A man named Slocum, now running a machine-shop down in Ketchikan.

That is all.

Mr. COBB.—Do you want to recall Mr. Strafford any more? He wants to get away.

Mr. JENNINGS.—No, I do not wish him any more.

[Testimony of C. E. Bennett.]

C. E. BENNETT, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name?

A. E. C. Bennett.

Q. Where do you live? A. Treadwell.

Q. How long have you lived there?

A. Three years.

Q. What is your occupation?

A. Master mechanic.

Q. How long have you been following that occupation? A. As machinist?

Q. Yes, sir.

(Testimony of C. E. Bennett.)

A. Since I was thirteen or fourteen years old.

Q. How long was that?

A. I am forty-one.

Q. You have been following that occupation how long, then?

A. That would be twenty-eight years.

Q. During that time, have you had occasion to use any cast iron or steel—pieces of castings?

A. Yes, sir.

Q. Heavy castings? A. Yes, sir.

Q. I will ask you if in your opinion, Mr. Bennett, any person can tell whether a casting is made of cast steel or cast iron by simply seeing the outside of the piece of casting and no other information being furnished?

A. No, indeed; I do not think so.

That is all.

Cross-examination.

(By Mr. JENNINGS.)

Q. You are a married man? A. Yes, sir.

Q. You have a wife and child?

A. I have a wife.

Q. Have you any children?

A. No children.

Q. You are working for them for wages?

A. Yes, sir.

That is all.

[Testimony of Mark Smith.]

MARK SMITH, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. Mr. Smith, what is your age?

A. Thirty-two—will be thirty-two my next birthday.

Q. What is your occupation?

A. Iron moulder.

Q. For what company?

A. The Treadwell Company.

Q. How long have you been iron moulder there?

A. About eight years.

Q. Mr. Smith, in the course of your experience and business as an iron moulder have you had occasion to handle large castings made of steel and iron?

A. Yes, sir.

Q. You have seen a great many of them?

A. I have.

Q. Tell the jury whether or not in your opinion it is possible for any person by looking at the outside and handling a casting without filing it or seeing any fracture to tell whether it is cast iron or cast steel?

A. No, sir; I do not believe any man living can do it.

Q. Did you on this morning get a number of pieces of metal and bring them to me at my office?

A. Yes, sir.

(Testimony of Mark Smith.)

Q. Do you know what each one of them is?

A. Yes, sir.

Q. Where did you get them from so as to be able to tell?

A. Most of them at the foundry out of the scrap-pile—some inside and some outside.

Q. Explain to the jury how you could tell.

A. I can tell by the grain of the metal by looking at it whether it was steel or cast iron.

Q. Are there any other ways?

A. I could tell by the fracture in the iron.

Q. You can tell by the fracture?

A. Yes, sir.

Q. You could tell the composition of the metal if there is a fracture that can be seen?

A. Yes, sir.

Q. I now hand you a piece of metal marked Defendant's Identification "N," and ask you if that is one of the pieces you brought over?

A. Yes, sir.

Q. Can you tell what it is?

A. That is babbitt-metal.

Mr. COBB.—We offer it in evidence.

Mr. JENNINGS.—I don't know what babbitt-metal—

COURT.—It may be admitted.

(Marked Defendant's Exhibit "N.")

Q. I now hand you defendant's Identification "E"; what is that? A. That is steel.

Mr. COBB.—We offer that in evidence.

(Testimony of Mark Smith.)

COURT.—No objection; it may be admitted.

(Marked Defendant's Exhibit "E.")

Q. I now hand you another piece of metal marked defendant's Identification "F," and ask you what it is? A. Steel.

Q. What sort of steel is that?

A. Tool steel.

Q. That is not cast steel? A. No.

Mr. COBB.—We offer that in evidence.

COURT.—It may be admitted.

(Defendant's Exhibit "F.")

Q. I next offer you a piece of metal marked Defendant's Identification "G" and ask you what that is? A. Manganese steel.

Q. Casting? A. Yes, sir.

Mr. COBB.—We offer it in evidence.

COURT.—It may be admitted.

(Marked Defendant's Exhibit "G.")

Q. I now hand you another piece of metal marked Defendant's Identification "K" and ask you what that is?

A. Cast-iron—one of the nuts off a car wheel.

Q. It shows a fresh break? A. Yes, sir.

Mr. COBB.—We offer it in evidence.

COURT.—No objection; it may be admitted.

(Marked Defendant's Exhibit "K.")

Q. I offer you another piece of metal marked Defendant's Identification "O" and ask you what that is? A. That is steel.

Q. That shows the grain and a fracture?

(Testimony of Mark Smith.)

A. Yes, sir, right here.

Q. Is that a casting? A. Yes, sir.

Q. Do you know what it came off of?

A. Yes, sir.

Q. What?

A. It came off of a piece of a drill seat or kind of turn-table so that it can be swung at any angle.

Mr. COBB.—We offer it in evidence.

COURT.—It may be admitted.

(Marked Defendant's Exhibit "O.")

Q. I will hand you another piece of metal marked Defendant's Exhibit "M" and ask you if you know what that is? A. Cast iron.

Mr. COBB.—We offer it in evidence.

COURT.—It may be admitted.

(Marked Defendant's Exhibit "M.")

Q. I will show you another piece of metal marked Defendant's Identification "H"—

A. That is cast iron.

Q. Any steel in that?

A. No.—Godedic iron; the softest iron you can buy.

Q. What do you say? Mr. Angell says there was some steel in it.

Mr. COBB.—We offer it in evidence.

COURT.—Admitted.

Q. What did you say it came off of?

A. It is crome steel—came off of the kind of shoes we use over there.

(Marked Defendant's Exhibit "J.")

(Testimony of Mark Smith.)

Q. I now hand you Defendant's Exhibit "L" and ask you what that is. A. Manganese steel.

Q. What did that come off of?

A. Came off a broken car wheel, out of the scrap pile.

Q. They are made of manganese steel?

A. Yes, sir.

Q. Is that a casting? A. Yes, sir.

Mr. COBB.—We offer that in evidence.

COURT.—It may be admitted.

(Marked Defendant's Exhibit "L.")

Q. I now hand you a piece of metal marked Defendant's Identification "I" and ask you if you know what that is. A. It is cast iron.

Mr. COBB.—We offer that in evidence.

COURT.—It may be admitted.

(Marked Defendant's Exhibit "I.")

Mr. COBB.—This is Defendant's Exhibit "H." I will now submit them to the jury so that they may examine them.

Q. Mr. Smith, were you living there in the year 1905 at Treadwell? A. Yes, sir.

Q. I will ask you, Mr. Smith, if at any time there was sent to you for the purpose of working it up in the foundry a broken six-foot sheave-wheel—do you remember that? A. Yes, sir.

Q. Just describe that sheave-wheel.

Mr. JENNINGS.—We object to that unless it is shown to be this particular sheave-wheel.

(Testimony of Mark Smith.)

Mr. COBB.—It is shown by the testimony here that the wheel was melted up some time after the first trial.

COURT.—It may be important if it is the same sheave-wheel.

A. It was all busted up; I broke it up and put it in the furnace.

Q. What was its condition before you broke it up?

A. When I saw it there was a piece gone out of the sheave. I did not measure it—I had it broken up and put into my charge the next morning.

Q. Just tell where the piece was out of the wheel.

A. A piece was gone out of the flange—on one side of the flange.

Q. Was part of the perimeter gone?

Mr. JENNINGS.—Objected to as leading.

COURT.—Objection sustained.

Q. Just describe it the best you can.

A. The size of the wheel?

Q. Anything you noticed about it.

A. It was a six-foot wheel and I noticed that there was a piece gone out of the flange or groove of the wheel where the rope goes over—I did not measure that piece—I broke it up.

Q. Before you get to that part, did you notice any patch on the wheel?

A. That I cannot say—when the sheave-wheel got down there, there was a piece gone out of it. I did not notice any patch on the wheel; I never examined

(Testimony of Mark Smith.)

it at all. That is all I could say about the sheave-wheel.

Q. What do you mean—was the flange broken out entirely or just a piece of it?

A. There was part gone out of the main wheel out of the sheave.

Q. Of the main wheel?

A. One side of the flange broken out.

Q. You are not a machinist, but an iron moulder?

A. I am an iron moulder by trade.

Q. I want you to describe about how much was gone.

A. There was a piece broken out of the wheel—

Q. How long was it?

A. I judge about ten inches—I never measured it.

Q. You did not pay much attention to it?

A. I did not.

Q. Was it broken clear through the perimeter?

Mr. JENNINGS.—Objected to as leading.

COURT.—Overruled.

A. Just a piece gone out of here—one side of the flange; just one piece straight through.

Q. Do you mean that the entire piece was gone?

A. No; I mean one part of the flange—there are two pieces where they form the groove; one piece was gone out here, one side of the flange.

Q. When you worked that wheel up what did you find its material to be? A. Steel.

Q. What did you make out of it?

A. Shoes and dies for use over there.

(Testimony of Mark Smith.)

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. JENNINGS.)

Q. How old a man are you?

A. I will be thirty-two my next birthday.

Q. Are you a married man? A. Yes, sir.

Q. Have a family and children?

A. Yes, sir.

Q. Working for the Treadwell Company?

A. Yes, sir.

Q. When you first came up here you worked for Billy Angell?

A. No, sir; I never worked for Billy Angell in my life.

Q. Never worked for Billy Angell?

A. No, sir.

Q. Billy Angell was over you—he was one of your superiors? A. No, sir.

Q. Didn't you ever work with him?

A. I never worked with Billy Angell.

That is all.

[Testimony of George F. Forrest.]

GEORGE F. FORREST, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. Please state your name.

A. George F. Forrest.

Q. Where do you reside? A. Juneau.

(Testimony of George F. Forrest.)

Q. How long have you resided here?

A. About fourteen years.

Q. What is your occupation?

A. Proprietor of the Juneau Iron Works.

Q. What does the Juneau Iron Works do?

A. General repair work.

Q. State to the jury what experience you have had as a machinist and iron worker.

A. I have had about eighteen or nineteen years' experience.

Q. During that time have you had much experience with castings, cast machinery—large castings?

A. I have in the last ten years.

Q. Mr. Forrest, state to the jury whether, in your opinion, any man can tell by looking at a casting and handling it, but without any other test, and when there is no fracture in it—just as it came from the manufacturer, whether a given piece of casting like a large sheave-wheel, for instance, is made of cast iron or cast steel?

A. He can tell it is a casting.

Q. Can he tell of which material it is made?

A. I cannot do it.

Q. Do you think—in your opinion, can any one do it?

Mr. JENNINGS.—We object to that on the ground that no proper foundation has been laid.

COURT.—Overruled.

A. I don't know—I never saw a man who could tell the difference—probably an expert might—I never could.

(Testimony of George F. Forrest.)

Q. Did you ever hear of any one who could?

A. I never did.

Q. You say you have had a good deal of experience in the last ten years in general repair work, I believe? A. Yes, sir.

Q. Do you remember seeing any sheave-wheels repaired? A. Yes, sir.

Q. I will ask you what is the purpose of a flange on a sheave-wheel? A. You say the purpose?

Q. Yes. A. On a sheave-wheel?

Q. Yes. A. To guide the rope.

Q. State whether or not the weight that the sheave-wheel is intended to bear in hoisting comes upon the flanges? A. Not necessarily.

Q. Do you know the proper way to repair it in case it happens to become broken?

A. I would, I think.

Q. Take this instance, Mr. Forrest: A six-foot sheave-wheel made of cast steel has a piece broken out of one of the flanges—the flanges are three and a half inches in depth—

Mr. CHENEY.—It is three and five-sixteenths according to the drawing.

Q. (Continued.)—the groove on it is three and seven-sixteenths inches in depth. It is worked—it is intended to work with a rope—a steel cable one and one-eighths inches in diameter. The wheel is broken

(Testimony of George F. Forrest.)

in this way. There is a piece from four to eight inches in length broken out of one flange—the break at its deepest place is above the top of the rope as it lies in the groove. That piece is set back in there, and a piece of boiler iron is made to fit the curvature of the wheel, and that is set outside of the flange and firmly riveted to the flange on each side, and the piece also firmly riveted to it—all firmly riveted together. These rivets are of the proper size and counter-sunk so as to leave a smooth surface on the inside. State whether or not in your opinion that is a proper way to repair that break?

A. That is the only way to repair it that I know of.

Q. Is it a proper way? A. Yes, sir.

Q. State whether or not a wheel of that kind so repaired is a reasonably safe and serviceable wheel?

A. I should think so.

Mr. COBB.—You may cross-examine.

(Clerk's Note: At the request of counsel for the Defendant in Error and agreeably to the Supplemental and Amended Designation of Defendant in Error under Rule 23, pages 339 to 352, both inclusive, have been withdrawn from the printed record.)

PLAINTIFF RESTS.

TESTIMONY CLOSED.

COURT.—I am inclined to excuse the jury at this time and take up the matter of instructions. I am not entirely satisfied about some of *the and* would like to hear from counsel on some of the instructions requested.

Gentlemen of the Jury: There are some legal questions in this case which must be settled before the case can be finally submitted to you. You will be excused until 1:30 this afternoon. In the meantime you should be careful to remember the admonition heretofore given to you not to talk to any one about

the case nor to permit any one to talk to you about it, nor to talk about it among yourselves or try to reach any conclusion in the case until you have heard the argument of counsel and the instructions of the Court and the matter is finally submitted to you. You may be excused until 1:30 this afternoon.

Mr. COBB.—I have a motion here which I now desire to make. It is as follows:

[Motion to Instruct Jury to Return Verdict for Defendant.]

Now comes the defendant, by its counsel, and moves the Court to instruct the jury to return a verdict for the defendant for the following reasons:

First: The amended complaint herein upon which this cause was tried charges the defendant with liability for the accident in which plaintiff's intestate lost his life because of alleged negligence in three respects, to wit:

a. That the cable by which the skip was being hoisted at the time of the accident in question occurred was old, weak, and insufficient for the purposes for which it was used.

b. That the sheave-wheel used by defendant at the time of the accident in operating said cable and in raising said skip up the shaft was old, weak, much used, cracked, broken and totally unfit for the said purposes.

c. That the defendant knowingly failed and neglected to construct in the shaft bulkhead or breaks of sufficient size or strength to prevent objects from

falling down upon and injuring persons at the bottom of said shaft.

Second: The evidence now introduced and before the Court and jury conclusively shows:

a. That the rope or cable in question was not old, weak and insufficient for the purposes for which it was used, but, on the contrary, was a new and entirely sufficient and proper cable for the purposes for which it was so being used.

b. The evidence conclusively shows that the sheave-wheel was an entirely proper, sufficient and reasonably safe wheel for the purposes for which it was being used, and was being kept and maintained in a reasonably proper state of repair, and was a reasonably safe and sufficient appliance.

c. The evidence shows that the bulkheads used and installed in the shaft were reasonably safe and sufficient appliances, and such as were in ordinary use by persons of ordinary care and prudence in shafts under conditions similar or identical with the conditions in the shaft of the defendant at the time of the accident.

Third: The evidence conclusively shows that at the time the plaintiff's intestate lost his life in the accident in the shaft the defendant exercised ordinary and reasonable care in providing an ordinary safe and secure place in which the plaintiff's intestate was at work; that the plaintiff established and enforced reasonable rules and regulations as to the inspection and maintenance of the appliances for the operation of said shaft, and discharged its whole duty to the plaintiff's intestate in that behalf.

Fourth: The evidence conclusively shows that the plaintiff's intestate would not have been injured had not the bulkhead at the 750-foot level in the Treadwell shaft been carried away by the falling skip on the happening of the accident in which plaintiff's intestate lost his life; the plaintiff's intestate had been at work in said 750-foot level for more than a month prior to the accident, had full opportunity of seeing said bulkhead daily; that he was an experienced miner in the work of sinking shafts, knew of the dangers inherent in said business and assumed the risk of the accident in which he lost his life.

Fifth: The evidence as a whole is utterly insufficient to sustain a finding of negligence on the part of the defendant which occasioned the accident in question.

Sixth: The evidence is too uncertain and indefinite as to the approximate cause of the accident to sustain a finding that it was in any manner due or directly traceable to the negligence of defendant.

(Whereupon counsel for both parties argue the matter before the Court.)

COURT.—Gentlemen, it is after twelve o'clock. I think we will suspend at this time until 1:30.

Court will be at recess until 1:30.

Court convened pursuant to adjournment at 1:30 P. M., and all parties being present as heretofore the following proceedings were had:

COURT.—Gentlemen of the Jury: There are some matters pending before the Court which are giving counsel and the Court a great deal of trouble.

You may be excused and retire in charge of the bailiff until that is finished and the Court will then send for you. You may proceed with your arguments, gentlemen.

(Whereupon counsel continued argument.)

COURT.—Call in the jury. Gentlemen of the Jury, the Court is not entirely ready to submit this matter to you. There has been a question of law raised which I am having some difficulty in determining. You should remember the admonition heretofore given you not to talk to any one about the case nor permit any one to talk to you, nor to talk about the case among yourselves or undertake to reach any conclusion in the case until the whole matter is finally submitted to you.

Court will take a recess until 10 o'clock to-morrow morning.

May 17, 1907.

Court convened pursuant to adjournment at 10 A. M., and all parties being present as heretofore the following proceedings were had:

COURT.—Gentlemen of the Jury: The Court is still undecided as to just what should be done in this case, so you may retire to the jury-room in charge of the bailiff until this question is settled when I will send for you.

(Whereupon counsel continue arguments.)

COURT.—Call in the jury. Gentlemen of the jury, this question has given counsel and the Court a great deal of trouble and I am not entirely satisfied yet. It is almost twelve o'clock and as I have

another duty to perform at two o'clock, the Court will be unable to take this matter up again until four o'clock, at which time you should be here. You should remember the admonition which I have so frequently given you that you must not talk to any one about this case or permit any one to talk to you and you should not talk to each other about it or undertake to reach any conclusion in the matter until the whole matter has been finally submitted to you.

Court will take a recess until 4 o'clock.

Court convened pursuant to adjournment at 4 P. M., and all parties being present as heretofore the following proceedings were had:

[Instructions of the Court.]

COURT.—Gentlemen of the Jury, this case is a suit for damages brought by Mr. Jennings, as administrator of the estate of Joe Leon, deceased. The bill of complaint shows that Joe Leon was an unmarried man and the evidence shows that he was from twenty to twenty-four years of age. The evidence is not definite on the question of his age. The only witness that I remember who testified upon that question with any degree of certainty was Pezzetti, who said he was twenty, twenty-one, twenty-two or twenty-four years of age. A young man, strong and in the prime of life, and the evidence and the complaint also shows that he was unmarried and that his parents—or at least his mother, was living.

The suit is brought by the administrator of his estate. The evidence discloses that he had no estate

except the claim against this defendant. That is admitted frequently by counsel also, and this suit is being waged for the purpose of recovering that damages as an asset of his estate. Counsel announces to the Court very frequently that his theory—the theory upon which this suit is brought and upon which the evidence is presented to the Court, is that it is brought by the administrator for the purpose of recovering as administrator what he claims to be the value of the decedent's life for the estate. Counsel has gone so far in that direction in fairness to the Court as to say in his opinion that it was not necessary to mention in the bill or prove by the evidence that Joe Leon had any father or mother living or to make any proof of their condition or pecuniary loss by his death.

Now, this action is based upon the statute of Alaska. It is under the statute and not the common law if there should be any recovery for the wrongful death of any person through an administrator. This is a creature of the statute and the decisions say that it is not a cause of action created by the statute. The first being the Lord Campbell Act, which counsel read to the Court this morning. Prior to 1900 we had no Civil Code in Alaska and the Oregon code was the law in this jurisdiction. Counsel called my attention to one or two cases brought under that code at that time and probably one since and one now pending before the Circuit Court of Appeals. Now, I have made a careful examination of this matter. I did that upon counsel's request for instructions. When

it is my duty to prepare instructions to submit to the jury I do not hesitate to refuse an instruction, although it may be offered by counsel on both sides, if in my judgment it does not correctly state the law. I feel that the Judge is responsible to the jury and litigants for a correct statement of the law and I never hesitate to perform that duty.

I discover a very great difference in the two statutes—that is, between the statute of Oregon and the statute of Alaska. The statute of Oregon is in line with counsel's argument and if this case were being waged in an Oregon jurisdiction, I have no doubt but what the Court there would say that counsel was correct, but I am in great doubt about it under our statute. I find that the decisions and the text-books divide the authorities upon this general subject of damages for wrongful death, and put Oregon as the leading statute in a column by itself on account of the peculiarity of its statute.

Now, we all know, as a matter of general history, that the statutes of Alaska, the Civil Code of Alaska, was very largely copied from the Oregon statute, and I have no doubt that section thirty-one of our Code of Civil Procedure was adopted from Oregon, and section 353 of our Code of Civil Procedure is probably borrowed to some extent from the Oregon statute. But Congress in passing that section amended it, and they amended it, it seems to me, in such a way as to remove it entirely from the category of Oregon decisions. Undoubtedly when a legislature borrows a law from another State it borrows the decisions and

construction which that law is given by the courts of the highest jurisdiction in that country, and that is undoubtedly true in relation to the laws which have been adopted from the Oregon statute. But here they expressed a determination not to adopt the Oregon provision. They have expressed a determination here not to permit the administrator to bring a suit for a wrongful death of this kind. The administrator expends the result of that suit in the ordinary way as a portion of that estate for the benefit of the injured person. But under our statute, our section 353, they have gone back to the old principle of the Lord Campbell Act, by giving to the wife and children of the deceased person the absolute right to the money derived from such damage or judgment if there is a wife or child to take it. But if not, it then goes to the other heirs of the deceased as part of the estate to become apparently under our own statute a part of the estate of the deceased. Now, in this case Joe Leon had neither wife nor children but he had a father and mother. Under our statute, if a recovery is had the property—the result of the suit—would be divided according to the rule of distribution of personal property in Alaska. The difficulty the Court finds is this—whether or not there is such a failure of proof as to bar the plaintiff from recovering, because there is no evidence of any sort or kind before this jury by which they can determine the value of the loss to the father and mother. It is a suit for damages, and it can only be sustained by showing that there has been a damage that somebody—

that the party who brings the suit has suffered some loss—some pecuniary loss—some right to the services of Joe Leon—some right to the support which he gave or the loss of some other pecuniary interest which they had in his existence. I do not believe that counsel states the rule correctly when he says to the Court that under our statute any one can procure himself to be appointed administrator for the estate of a person who is killed when that person leave no other estate and then bring a suit in the name of the estate of that deceased person and recover damages from one who is accused of having caused his death through negligence. I do not believe that is the law. It certainly is not the policy of the law, because a law of that kind would be one which would add encouragement to litigation—a disturbing litigation when anybody would be injured.

In this case no person is injured because the deceased is dead and a cause of action does not serve to assist him. He has no relatives, therefore there is no person who is damaged in any way except the person who is dead. Now, if the person who has been killed has been killed through any criminal negligence of any one, the state will step in and punish the guilty person and the damage is thereby cured. But if there is no criminal act of any character and no estate to be protected. There must be some one depending upon the deceased for some pecuniary right before there can be a suit for damages maintained by the administrator. The administrator can not maintain that suit without he shows an injury—not to

some nonentity which he calls an estate, but to some person, wife, child, relative or otherwise.

Now, in his case there is no such proof. There is some proof that the deceased left a mother but I take it that the rule is that before the case can possibly go to the jury—before they can recover damages, that they must show some injury other than the sorrow and grief which we feel for the loss of our children before they can maintain a civil suit for damages.

Mr. Cobb handed me a text-book, Tiffany on Death by Wrongful Act. It is a mere compilation of the decisions and cases, but I do not find anything in it which I have not already discovered from my examination of the authorities. It does set down the rule in relation to matters of this kind and cites the authorities.

But our own court—the Supreme Court of the United States—has determined this matter in the case of Stewart v. Baltimore and Ohio Railroad Company, decided in 1897, long since the Oregon case which counsel called to my attention was decided, and I am constrained by my own sense of logic and law and what I think constitutes the proper proof in a suit for damages and accept this and apply it to the case at bar. This was a suit brought in the District of Columbia for the death of one Casey.

"On October 22, 1894, plaintiff in error filed in the Supreme Court of the District of Columbia an amended declaration containing two counts. The first alleged that John Andrew Casey, plaintiff's in-

testate, was killed through the negligence of the defendant company, in the State of Maryland; that said intestate left surviving no parent or child but only his wife, Alice Triplett Casey, for whose benefit this action was brought. The second count set forth in addition to the matters disclosed in the first a statute of the State of Maryland in respect to recovery in such cases. The statute in force in the District of Columbia, act of February 17, 1885, C. 126, 23 Stat. 307, provides for recovery in case the act causing death is done within the limits of the District of Columbia; that the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured; that the recovery shall not exceed $10,000; that the action shall be brought in the name of the personal representative of the deceased, and within one year after his death, and that the damages recovered shall not be appropriated to the payment of the debts of the deceased, but enure to the benefit of his or her family and be distributed according to the provisions of the statute of distributions."

It has all been excluded by our statute. Of course our statute has one clause which is not in theirs, and that is in regard to the wife and child.

Section 2. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the State of Maryland, for the use of the person entitled to dam-

ages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from the death of the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above-mentioned parties, in such shares as the jury by their verdict shall find and direct.

While it will not be necessary to read the whole of the opinion, I will refer to that portion of it which points out the difference between those codes which provide for the recovery of damages for the heirs specifically and those codes which allow and provide for the recovery of damages for the benefit of the estate. The Court said, "What are the differences between the two statutes? As heretofore noticed, speaking of another matter, "the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured." In other words it was the common law that was not recognized. "By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect." And that is the main purpose and effect of our statute and the Oregon statute also. "The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff in the States; in this District the personal representative of the deceased. But neither the State in the one case nor the personal

representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become a part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting from the taking away of their relative."

Now, under our statute the wife and children are given the right to recover, and if the damages are recovered the money goes to the wife and children without any regard to the estate. It does not go to the estate and I am inclined to rule just as the authorities generally do in matters of this kind hold. That section 31 of our code and section 353 are to be read together and as part and parcel of the statute and I am inclined to hold that the father and mother are as much entitled, in the absence of a wife and children, to have that money set apart for them and not to be paid out on debts as the wife and child are. At least, I take that view of it.

The Court goes on in this case and says: Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But in each the

important matter is the award of damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. But neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. Yet it is true that the beneficiaries of such an action may not in every case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely to be dependent on the party killed, and the remote relatives can seldom, if ever, be regarded as suffering loss from the death. After that the Court dismissed the case.

In my view of the authorities the question of recovery, as I said before, goes to the pecuniary loss and not because of the sorrow and grief at the loss of a child and before there can be any recovery there must be evidence presented to the jury either that the parent has suffered that loss in that death. The jury cannot say that because of the mere fact of his death that any one has been damaged in the sum of $10,000—they may not be damaged at all in a pecuniary sense. It might be that the deceased was a cripple—probably a helpless invalid or something of that kind.

So that in this case I am constrained to take the view that there is an absolute failure of proof of any damages and instruct the jury to bring in a verdict for the defendant.

I do not know just for the moment what I would do on the general motion made by Mr. Cobb, but since in any view which I can take of this case there must be a verdict for the defendant, I am constrained to make it include Mr. Cobb's motion. I am inclined to take the view that there is no proof in this case of carelessness or negligence on the part of the defendant which will permit the recovery of damages. That the evidence shows that ordinary care was used in the management of the sheave-wheel, the skip, the shaft and the bulkhead. Of course the accident occurred. But accidents occur when nobody is careless. Sometimes they occur when there is no negligence. Accidents sometimes occur from conditions which cannot be foreseen by ordinary care. Nobody knows just why this accident did occur. The accident did occur but nobody knows why, and in my judgment there is no proof sufficient to go to the jury so that they can say why it occurred. The skip went through the bulkhead and killed the deceased, but in my judgment there is no evidence which shows that there was any negligence on the part of the company. I say again to counsel that I do not know what view I would take of the general motion of Mr. Cobb's, but I give counsel the benefit of that statement, so that if they have the matter appealed they will understand exactly the position of the Court.

Mr. JENNINGS.—If the Court please, I wish to save an exception to that ruling.

COURT.—Very well. Gentlemen of the jury: Under the view which the Court takes of this matter

you will be instructed to sign a formal verdict in favor of the defendant upon the question of law which has been described by the Court. You will appoint one of your members foreman to sign the verdict.

You will sign the verdict and the record will show the reason why you signed it—that you signed it under the instructions of the Court.

(Whereupon E. C. Hurlbutt signed the verdict as foreman.)

Verdict.

COURT.—We, the jury selected, impaneled and sworn in the above-entitled and numbered cause, find for the defendant. E. C. Hurlbutt, Foreman.

The verdict will be filed and the jury may be excused from any further attendance on the Court. Those of you who are on the regular panel will be excused until 10 o'clock to-morrow morning. Those who are not on the regular panel will be excused from any further attendance on the Court.

Mr. CHENEY.—If the Court please, we desire to save any exception to the filing of the verdict.

The COURT.—The record will show that.

Court will take a recess until 10 o'clock to-morrow morning.

Motion for New Trial and Order Overruling Same.

And within the time prescribed by statute plaintiff made and filed hereon his motion for a New Trial on the ground of errors of the Court as follows:

"(1) In allowing to be read the testimony of Swan

Barquist; (2) in instructing the jury to return a verdict for defendant."

Said motion having been argued was, on the 25th day of May, 1907, by order entered in the Journal, overruled.

And on June 25, 1907, the Court entered its final judgment herein upon the verdict heretofore rendered.

[Judge's Certificate to Bill of Exceptions.]

I, James Wickersham, one of the Judges of the District Court for the District of Alaska, holding a term of said court in Division No. One of said District of Alaska, by order of the Attorney General of the United States and by interchange with Honorable Royal A. Gunnison, the judge regularly assigned to said division, and being the judge who presided at the trial of the above-entitled cause, do hereby certify that the within and foregoing Bill of Exceptions was duly presented to me for signature by the counsel for plaintiff, and for settlement and certification, at the term of court at which the said cause was tried and within the time and in the manner prescribed by the rules and practice of said court; and having examined the same and found it to be true and correct, I do now, and within the said term of said court, and according to its practice, allow, settle and certify to same, and order the same to be filed as and to become a part of the record herein as a true and correct bill of exceptions.

And I do further certify that said Bill of Exceptions contains the evidence and all the evidence intro-

duced or offered by either party to the cause at the trial, or otherwise, and my rulings thereon, and all proceedings therein.

Defendant's Exhibits "E" to "O," inclusive, are small specimens of iron, steel or other metals referred to in the testimony of Mark Smith and W. C. Angell, and it being impracticable to correctly represent the same by drawing or photograph, I direct that, in case of a writ of error being sued out herein, the said original exhibits be transmitted to the Appellate Court by the clerk of this court.

And I do further certify that the plaintiff herein duly presented to this court for settlement and certification an abridged form of bill of exceptions containing the testimony herein in narrative form, but defendant in error objected and insisted that a full transcription of the stenographer's notes taken at the trial be certified, and I have accordingly done so.

Witness my hand and the seal of this Court this seventh day of September, 1907.

[Seal] JAMES WICKERSHAM,
Judge.

[Endorsed]: 460A. R. W. Jennings, as Admr. of Joe Ernesto Leonesio, Alias Joe Leon, Pltff., vs. Alaska Treadwell Gold Mining Co., Deft. Bill of Exceptions as Settled by the Judge. Filed Sep. 7, 1907. C. C. Page, Clerk. By ————, Deputy.

[Same Court, Same Cause.]

No. 460-A.

Judgment.

This cause came on regularly to be heard, and a jury having been selected, impaneled and sworn and having heretofore returned a verdict for the defendant, under the instructions of the Court, and a motion for a new trial having been heretofore denied, now on motion of Messrs. Malony & Cobb, attorneys for the defendant, for judgment upon said verdict,

It is ordered and adjudged that the plaintiff take nothing by his actions herein and the defendant go hence without day and have and recover of the plaintiff its costs herein incurred, for which let execution issue; that plaintiff is allowed until September 1, 1907, within which time to have prepared, filed and certified his bill of exceptions herein.

Dated this 25th day of June, 1907.

JAMES WICKERSHAM,
Judge.

O. K.—COBB.
O. K.—R. W. JENNINGS.

[Endorsement]: Original. No. 460-A. In the District Court for Alaska, Division No. 1, at Juneau. R. W. Jennings, as Administrator, etc., Plaintiff, vs. Alaska Treadwell Gold Mining Co., Defendant. Judgment. Filed Jun. 25, 1907. C. C. Page, Clerk. By R. E. Robertson, Asst. Malony & Cobb, Attorneys for Defendant. Office: Juneau, Alaska.

[Order Extending Time, etc.]

Form 125—1906.

SIGNAL CORPS, UNITED STATES ARMY.

8 TELEGRAM.

RECEIVED AT

7 SI DR V CH 60 OB

Valdez, Alaska, Aug. 21-22-07.

C. C. Page, Clerk Dist. Court, Juneau, Alas.

Ordered that time in all matters set for August 20 and Sept. first be extended to Sept. seventh leave here today for Juneau via Seattle notify Iskal can meet me in Seattle wont leave Seattle till after Sept first notify Cown and other lawyers record this order.

JAMES WICKERSHAM,
Dist. Judge.

9:30 A. M.

Order Extending Time in Matters Set for Aug. 20 and Sept. 1st to Sept. 7th, 1907. Filed Aug. 22, 1907. C. C. Page, Clerk. By R. E. Robertson, Asst.

[Same Court, Same Cause.]

Petition for Writ of Error [Order Allowing Same and Fixing Amount of Bond].

Plaintiff in the above-entitled cause, feeling himself aggrieved by the judgment of the above-entitled court, rendered in said cause on the twenty-fifth day of June, 1907, comes now, by his attorney, Z. R. Cheney, Esq., and files and presents his Assignment of Errors, and petitions said Court for an order allowing said plaintiff to prosecute a Writ of Error to

the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which said plaintiff shall give and furnish upon said Writ of Error.

And your petitioner will ever pray, etc.

Z. R. CHENEY,
Attorney for Plaintiff,
Juneau, Alaska.

The writ of error asked for is allowed.

The amount of bond to be furnished thereon is fixed at $500.00/100.

Done at Chambers this 22d day of June, 1908.

ROYAL A. GUNNISON,
Judge.

[Endorsed]: No. 460-A. In the District Court for Alaska, Division No. 1, at Juneau. R. W. Jennings, as Administrator, etc., Plaintiff, vs. Alaska Treadwell Gold Mining Company (a Corporation), Defendant. Filed. Petition for Writ of Error. Jun. 22, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy. Z. R. Cheney, Attorney for Plaintiff. Office: Juneau, Alaska.

[Assignment of Errors.]

[Same Court, Same Cause.]

Comes now the plaintiff in the above-entitled action, and, at the time of filing his petition for a writ of error, hereby files his assignment of errors upon which he will rely for reversal.

(I)

The Court erred in holding at the conclusion of all the evidence, that "There is an absolute failure of proof of any damages."

(II)

The Court erred in holding at the conclusion of all the evidence, that there was no proof in this case of carelessness or negligence on the part of the defendant which would permit the recovery of damages.

(III)

The Court erred in sustaining defendant's motion, made at the conclusion of all the evidence, to direct the jury to return a verdict in favor of the defendant.

(IV)

The Court erred in directing the jury to return a verdict in favor of the defendant.

(V)

The Court erred in denying plaintiff's motion for a new trial.

(VI)

The Court erred in rendering judgment in favor of defendant.

And for said errors and others manifest of record herein the plaintiff prays that said judgment and orders of said Court be reversed and the case remanded for a new trial.

Z. R. CHENEY,
Attorney for Plaintiff,
Juneau, Alaska.

[Endorsed]: No. 460-A. In the District Court for Alaska, Division No. 1, at Juneau. R. W. Jennings, as Administrator, etc., Plaintiff, vs. Alaska Tread-

well Gold Mining Company (a Corporation), Defendant. Assignment of Errors. Filed June 22, 1908, C. C. Page, Clerk. By A. W. Fox, Deputy. Z. R. Cheney, Attorney for Plaintiff. Office: Juneau, Alaska.

[Same Court, Same Cause.]

Bond on Writ of Error.

Know all men by these presents: That we, R. W. Jennings, plaintiff in the above-entitled cause, as principal, and Claude Ericson and Allen Shattuck, as sureties, are jointly and severally bound unto the above-named Alaska Treadwell Gold Mining Company, a corporation, in the sum of five hundred dollars, to be paid said Alaska Treadwell Gold Mining Company, its assigns and successors, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed by us and dated this 22d day of June, 1908.

The condition of this obligation is such that whereas the said plaintiff has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a judgment and order of the United States District Court, for the District of Alaska, Division No. One, which judgment was made and entered in the above-entitled court and cause on the 25th day of June, 1907; now, therefore, if the above-named plaintiff shall prosecute said writ of

error to effect and shall answer all damages and costs of appeal, if he shall fail to make good his said plea, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

Witness our hands and seals the day and year aforesaid.

R. W. JENNINGS, [Seal]
As Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon.

R. W. JENNINGS. [Seal]
CLAUDE ERICSON. [Seal]
ALLEN SHATTUCK. [Seal]

In presence of:
Z. R. CHENEY,
NEWARK L. BURTON.

United States of America,
District of Alaska,—ss.

Claude Ericson and Allen Shattuck, being first duly sworn, deposes and says, each for himself and not one for the other: I am a citizen of the United States, a resident of Alaska, not an attorney or counsellor at law, marshal, deputy marshal, commissioner, clerk or other officer of any court; I am worth the sum of $500.00—five hundred dollars—over and above all my just debts and liabilities and exclusive of property exempt from execution.

CLAUDE ERICSON,
Surety.
ALLEN SHATTUCK,
Surety.

Subscribed and sworn to before me this 22d day of June, 1908.

[Seal] Z. R. CHENEY,
Notary Public.

United States of America,
District of Alaska,—ss.

This is to certify that on this 22d day of June, 1908, personally appeared before me, a notary public within and for the district aforesaid, the hereinbefore named Claude Ericson and Allen Shattuck, with whom I am personally acquainted, and who acknowledged to me that they executed the foregoing bond freely and voluntarily as their own free act and deed for the uses and purposes therein mentioned.

[Seal] Z. R. CHENEY,
Notary Public.

The foregoing bond being correct in form and sufficient in amount, and the sureties being sufficient, is hereby approved.

Dated June 22, 1908.

ROYAL A. GUNNISON,
Judge.

[Endorsed]: No. 460-A. In the District Court for the District of Alaska, Division No. One, Juneau. R. W. Jennings, as Admr., Plaintiff, vs. Alaska Treadwell Gold Mining Co., Defendant. Bond on Writ of Error. Filed Jun. 22, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy. Z. R. Cheney, Attorney for Plaintiff. Juneau, Alaska.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 460-A.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, Alias JOE LEON, Deceased,

Plaintiff,

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America, to the Judge of the District Court for the District of Alaska, Division No. 1, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between R. W. Jennings, as administrator of the estate of Joe Ernesto Leonesio, alias Joe Leon, deceased, plaintiff, and the Alaska Treadwell Gold Mining Company, a corporation, defendant, manifest error hath happened to the great prejudice and damage of the said plaintiff as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this Writ, so as to have the same at the said place in said Circuit on or before thirty days from this date, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 22 day of June, 1908.

Attest my hand and the seal of the District Court for the District of Alaska, at the Clerk's office at Juneau, Alaska, on the day and year last above written.

C. C. PAGE,
Clerk of the District Court for the District of Alaska, Division No. 1, at Juneau.

Allowed this 22 day of June, 1908. Cost bond fixed at $500 dollars.

[Seal] ROYAL A. GUNNISON,
Judge of the District Court, Division No. 1, at Juneau.

A copy of the above writ of error has this day been lodged in my office for defendant in the above cause.

Dated June 22, 1908.

C. C. PAGE,
Clerk of the Above-entitled Court.

Due service of a copy of the within is admitted this 22d day of June, 1908.

SHACKLEFORD & LYONS,
Attorneys for Defendants.

[Endorsed]: No. 460-A. In the District Court for Alaska, Division No. 1, at Juneau. R. W. Jennings, as Administrator etc., Plaintiff, vs. Alaska Treadwell Gold Mining Company (a Corporation), Defendant. Writ of Error. Filed Jun. 22, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy. Z. R. Cheney, Attorney for Plaintiff. Office: Juneau, Alaska. Delaney Building.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 460-A.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, Alias JOE LEON, Deceased,
Plaintiff,

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),
Defendant.

Citation [on Writ of Error (Original)].

United States of America,—ss.

The President of the United States to Alaska Treadwell Gold Mining Company and Messrs. Maloney & Cobb, and Shackleford & Lyons, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from the date of this Writ, pursuant to a writ of error filed in the Clerk's office of the District Court for the District of Alaska, Division No. 1, at Juneau, in the case wherein R. W. Jennings, as administrator of the estate of Joe Ernesto Leonesio, alias Joe Leon, deceased, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 22d day of June, A. D. 1908, and the Independence of the United States the one hundred and thirty-second.

ROYAL A. GUNNISON,
Judge.

[Seal] Attest: C. C. PAGE,
Clerk.

Due service of a copy of the within is admitted this 22 day of June, 1908.

SHACKLEFORD & LYONS,
Attorneys for Defendant.

[Endorsed]: No. 460-A. In the District Court for Alaska, Division No. 1, at Juneau. R. W. Jennings, as Administrator etc., Plaintiff, vs. Alaska Treadwell Gold Mining Company, a Corporation, Defendant.

Citation. Filed Jun. 22, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy. Z. R. Cheney, Attorney for Plaintiff. Office: Juneau, Alaska. Delaney Building.

[Order of Substitution of Attorneys.]

[Same Court, Same Cause.]

On the petition of the defendant, Messrs. Shackleford & Lyons are hereby substituted in place of Messrs. Maloney & Cobb, as attorneys for the Alaska Treadwell Gold Mining Company, the defendant herein.

Done in chambers this 22 day of June, 1908.

ROYAL A. GUNNISON,
Judge.

[Order Extending Time to File Transcript on Writ of Error, Dated July 6, 1908.]

[Same Court, Same Cause.]

Plaintiff herein having sued out a writ of error to remove this cause to the U. S. Circuit Court of Appeals at San Francisco, and it appearing to the Court that owing to rush of business in the office of the Clerk of this court, the transcript of the record will not be ready for transmittal to the said Circuit Court before the return day of the citation, it is ordered that the time for the filing of said transcript in said court

be and the same is hereby extended to August 22, 1908.

Dated July 6, 1908.

ROYAL A. GUNNISON,
Judge.

[Endorsed]: No. 460-A. R. W. Jennings, as Admr. v. Alaska Treadwell Gold Mining Co. Order Extending Time to File Transcript on Writ of Error. Filed Jul. 6, 1908. C. C. Page, Clerk. By ————————, Deputy.

In the District Court for the District of Alaska. Division No. 1 at Skagway.

No. 460-A.

R. W. JENNINGS, Administrator of the Estate of JO. ERNESTO LEONESIO, alias JO. LEON,

Plaintiff,

vs.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant.

Order [Extending Time to File Transcript on Writ of Error, Dated August 6, 1908].

On oral motion of the plaintiff herein, it is ordered that the time of filing in the Circuit Court of Appeals at San Francisco of the transcript of record

on writ of error herein, be, and the same is hereby, extended until September 1st, 1908.

Done in open court this 6th day of August, 1908.

ROYAL A. GUNNISON,

Judge.

460-A. R. W. Jennings, as Admr., etc., vs. Alaska Treadwell Gold Mining Co. Order Extending Time to File Transcript to September 1, 1908. Filed Aug. 6, 1908. C. C. Page, Clerk. By R. E. Robertson, Asst.

[Clerk's Certificate to Transcript of Record.]

[Same Court, Same Cause.]

I, C. C. Page, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the foregoing and hereto annexed four hundred and three typewritten pages, numbered from 1 to 403, both inclusive, constitute a full, true and correct copy of record and the whole thereof as per the praecipe of the Plaintiff in Error, said praecipe being on file herein and made a part hereof, in cause No. 460-A, wherein R. W. Jennings, as administrator of the estate of Joe Ernesto Leonesio, alias Joe Leon, deceased, is plaintiff in error, and the Alaska Treadwell Gold Mining Company, a corporation, is defendant in error.

I do further certify that the said record is by virtue of the Writ of Error and the Citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that in accordance with an order of this Court made and entered on the 7th day of September, 1907, I am forwarding by express under separate cover, addressed to Hon. F. D. Monckton, Clerk of the Circuit Court of Appeals for the Ninth Circuit, San Francisco, California. Defendant's original exhibits "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," and "O," offered in evidence at the trial of said cause and being small pieces of steel, iron, etc., which said exhibits are too heavy to be attached to this written record or to be transmitted through the mails.

I do further certify that, in accordance with a written stipulation made and entered into by and between the respective counsel for the plaintiff in error and the defendant in error, I have attached to and made a part of this record only that portion of Defendant's Exhibit "B" which shows the four-ton capacity skip constructed by the Alaska Treadwell Gold Mining Company; that the original Defendant's Exhibit "B" is a blue-print of the said four-ton capacity skip and an ore car, both constructed by the Alaska Treadwell Gold Mining Company, together with cost and specifications of each.

I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to one hundred seventy-four dollars and eighty-five cents ($174.85) has been paid to me by R. W. Jennings, Plaintiff in Error herein.

In witness whereof I have hereunto set my hand and affixed the seal of this Court at Juneau, Alaska, this 13th day of August, A. D. 1908.

[Seal] C. C. PAGE,
Clerk of District Court, Dist. of Alaska, Division No. 1.

By A. W. Fox,
Deputy.

[Clerk's Supplemental Certificate to Transcript of Record.]

In the District Court for the District of Alaska, Division No. 1.

No. 460-A.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, alias JOE LEON, Deceased,

Plaintiff in Error,

vs.

ALASKA-TREADWELL GOLD MINING COMPANY (a Corporation),

Defendant in Error.

I, C. C. Page, Clerk of the District Court for the District of Alaska, Division No. 1, do hereby certify that, in accordance with an order of the above-entitled court duly made and entered on the 7th day of September, 1907, I enclose herewith Defendant's original Exhibits No. "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," and "O," being small

pieces of steel, iron, etc., offered in evidence at the trial of the above-entitled cause. I do further certify that the above numbered original exhibits belong to and are a part of the written record on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, the return whereof is this day made; and that the said Defendant's original Exhibits being too heavy and cumbersome to attach to or be made a part of the said written record, it is therefore necessary to send, and I do hereby certify that I am this day sending, the same to Hon. F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, under separate cover and by express.

In witness whereof I have hereunto set my hand and the seal of the above-mentioned court this 13th day of August, 1908.

[Seal] C. C. PAGE,

Clerk of District Court, Dist. of Alaska, Division No. 1.

By A. W. Fox,

Deputy.

[Endorsed]: No. 1638. United States Circuit Court of Appeals for the Ninth Circuit. Certificate to Original Exhibits. Filed Aug. 24, 1908. F. D. Monckton, Clerk.

[Endorsed]: No. 1638. United States Circuit Court of Appeals for the Ninth Circuit. R. W. Jennings, as Administrator of Estate of Joe Ernesto Leonesio, alias Joe Leon, Deceased, Plaintiff in Error, vs. The Alaska Treadwell Gold Mining Company (a Corporation), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed August 24, 1908.

F. D. MONCKTON,
Clerk.

No. 1638

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, alias JOE LEON, Plaintiff,

Plaintiff in Error,

vs.

THE ALASKA TREADWELL GOLD MINING COMPANY (a Corporation), Defendant,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

R. W. JENNINGS,
Z. R. CHENEY,
Attorneys for Plaintiff in Error.

L. S. B. SAWYER,
Of Counsel.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1638.

In the United States Circuit Court of Appeals for the Ninth Circuit.

R. W. JENNINGS, as Administrator of the Estate of JOE ERNESTO LEONESIO, Alias JOE LEON, Plaintiff,

Plaintiff in Error,

vs.

THE ALASKA TREADWELL GOLD MINING COMPANY (a Corporation), Defendant,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

(Calling attention to the Judge's certificate at the middle of page 371 of the printed record, as explaining why so bulky a transcript is brought up to present the points of this case, we proceed to the)

STATEMENT OF THE CASE.

"Plaintiff's intestate was at work sinking the main shaft of the Treadwell mine and was about 800 feet below the surface. The shaft was perpendicular. Ore was being hoisted through the shaft from the 440 foot level by a skip and hoisting apparatus. The skip was a large iron bucket and together with its frame and its usual load, it weighed approximately five tons. It was hoisted by means of a cable to a point 60 feet above the mouth of the shaft, at which point the cable ran over a sheave wheel, and thence to a drum around

which it was wound. While the skip with its load was being drawn to the surface the sheave wheel broke; the cable parted, and the loaded skip fell, carrying away two bulkheads below, and killing the plaintiff's intestate. In the complaint three grounds of negligence were alleged: First, the use of an old and weak cable; second, the use of an old, weak, much used and broken sheave wheel; third, the omission to provide sufficient bulkhead in the shaft." On the trial there was no proof of negligence as to the first of the grounds so alleged.

At the conclusion of the evidence the Court, *of its motion,* held that there was no proof of damages, and instructed the jury to find a verdict for the defendant, incidentally remarking, "I do not know just for the moment what I would do on the general motion made by Mr. Cobb (Record p. 354), but since in any view which I can take of this case there must be a verdict for the defendant, I am constrained to make it include Mr. Cobb's motion." (Record p. 368 top.)

The assignments of error (Record p. 374) are as follows:

I. The Court erred in holding at the conclusion of all the evidence that "There is an absolute failure of proof of any damages."

II. The Court erred in holding at the conclusion of all the evidence, that there was no proof in this case of carelessness or negligence on the part of defendant which would permit the recovery of damages.

III. The Court erred in sustaining defendant's motion, made at the conclusion of all the evidence, to

direct the jury to return a verdict in favor of the defendant.

IV. The Court erred in directing the jury to return a verdict in favor of the defendant.

V. The Court erred in denying plaintiff's motion for a new trial.

VI. The Court erred in rendering judgment in favor of defendant.

POINTS, ARGUMENT AND AUTHORITIES.

(I.)

Evidence of Damages.

The evidence shows that decedent was a helper on a machine drill, skilled laborer, about twenty-four years of age, was a good workman who knew his business, strong, healthy young man, earning and capable of earning $3.75 to $4.25 per day (Peterson pp. 22, 25, and Albion Bartello pp. 262 and 264). The answer admits that he was earning $3.50 per day (par. VIII, p. 15). The American Experience Tables of Mortality showing his life expectancy were introduced (p. 121). In the absence of evidence to the contrary, he will be presumed to be of the fair average of industry, sobriety and frugality. The measure of damages is the earning capacity of the deceased.

4 Sutherland on Damages, sec. 1277, 4th ed.

The learned Judge of the court below held (p. 358 et seq.) that plaintiff was not entitled to recover because there was no evidence that there was anyone

dependent upon the wages of the deceased and so no one damaged by his death.

Answer: In the light of the statute and the decisions it is, we apprehend, not obvious to the naked eye that it is at all material whether there was or was not anyone dependent on the labor or wages of deceased. The statute plainly gives the right of action to the Administrator of the Estate *for the benefit of the Estate* (Carter's Annotated Code of Alaska, p. 222, sec. 353). The cause of action is thus plainly made an asset of the estate; it may be the only asset (Devalle de Costa vs. Southern Pacific Co., Vol. 160 Fed. Rep., p. 216). The statute of Alaska is taken almost verbatim from the statute of Oregon, and the latter received judicial interpretation by the Oregon Court in the case of Perham vs. Portland Electric Co., 33 Oreg. 451. That case was decided in 1898; the Alaska statute was passed in 1900; presumably the holding of the Oregon court construing that statute was adopted also. That case exhaustively reviews the authorities, and the conclusions of the Court are:

(I.) This is not a survival statute, but creates a new right of action in the administrator *for the benefit of the estate;*

(II.) It is wholly immaterial whether the deceased left surviving him any heirs or creditors whatsoever.

On the reasoning and authority of that case we implicitly rely and we will not, in this brief, further pursue that branch of the inquiry, for it will be apparent on examination that the cases cited by the

learned trial Court in his remarks (Record p. 358 et seq.) are dependent upon statutes vitally different from the Oregon or Alaska statute.

(II.)

Evidence of Negligence.

Was there evidence of negligence sufficient to go to the jury?

Answer: This was the casualty which resulted in the death of one Ole Linge, and all the evidence in the case of Z. R. Cheney, Administrator of the estate of Ole Linge, vs. Alaska Treadwell Co., except the evidence of the employee who cleaned out the shaft, is present in the case at bar. The evidence in the Cheney case has lately been examined by this Court and found to be sufficient (162 Fed., p. 593). In that case the Court said (Idem., p. 595): "It is contended that the trial Court erred in denying the motion of plaintiff to instruct the jury to return a verdict in its favor, and it is urged that there was no evidence to go to the jury to show that the accident resulted from any defect in the sheave wheel, or that there was negligence in its use. Upon a careful consideration of the evidence we think the contention is not sustained. It was in evidence that a short time before the accident a piece from 12 to 14 inches long had broken out of one of the flanges of the wheel, and that the wheel had been repaired by placing a piece of iron on the outside thereof below the break, upon which the broken piece was put back and riveted. There was evidence that the wheel was cast iron. There was evidence of expert machinists

that the wheel should not have been repaired at all, and that its use as repaired was dangerous; there was the testimony of the employee who was sent down to clear out the bottom of the shaft after the accident, that he found a piece of the perimeter of the broken wheel about two feet long with a patch on the cast iron piece and a broken spoke. Nor was there lack of evidence to show casual connection between the defect in the wheel and the accident. There was testimony that one end of the break went through the rivet holes which had been made when the wheel was previously patched, and testimony that the second break was "on account of the patch not being put on in the right way." There was testimony to show that if the perimeter of the wheel were broken, the cable would naturally drop, and would be likely to break. * * * It was shown that the fracture of the wheel would cause the wheel to slip and to drop to the shaft, and that the cable would be likely to break, and it is in evidence that the wheel broke at the joint where it had been previously patched, and there was expert evidence that it should not have been used at all after having been broken in the manner indicated in the testimony." This Court found in the Cheney case, that such testimony was sufficient, and yet in the case at bar, there was not only the testimony so found to be sufficient by this Court

(Nelson, p. 51; Taylor, p. 121;
Angell, p. 175; Thomas, p. 183;
Hefele, p. 192; Pillsbury, p. 204;
Angell, p. 223),

but there was also testimony as to the insufficiency of the bulkhead.

(Taylor, p. 135—Req., p. 151;
Martina, p. 216.)

We think that the two cases cited, to wit, 33 Oreg. 451 and 162 Fed. 593, effectually dispose of the contentions of the trial Judge, and that the judgment should be reversed and the case remanded.

Respectfully submitted,

R. W. JENNINGS,
Z. R. CHENEY,
Attorneys for Defendant in Error.

L. S. B. SAWYER,
Of Counsel.

No. 1638

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

R. W. JENNINGS, as Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon, Deceased, *Plaintiff*,

Plaintiff in Error,

vs.

THE ALASKA TREADWELL GOLD MINING COMPANY (a corporation), *Defendant*,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

SHACKLEFORD & LYONS,
JOHN FLOURNOY,
Attorneys for Defendant in Error.

Filed this.....day of October, A. D. 1908.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 1638

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

R. W. JENNINGS, as Administrator of the Estate of Joe Ernesto Leonesio, alias Joe Leon, Deceased, *Plaintiff,*
Plaintiff in Error,

vs.

THE ALASKA TREADWELL GOLD MINING COMPANY (a corporation), *Defendant,*
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error will, in view of the testimony before the jury at the time the motion of defendant to instruct the jury to return a verdict in its favor was made and granted (*Tr.* 354), and in view of the decision of this Court in *Alaska Treadwell Gold Mining Co. v. Cheney,* 162 Fed. 593, limit the present discussion to one question, namely: Was the instruction of the Court to return a verdict in favor of de-

fendant because there was a failure of any proof of damages suffered by the next of kin of deceased correct under Section 353 of the Code of Civil Procedure of Alaska?

The attention of the Court is directed to the two following conclusions, which we contend are fully sustained by an examination of the record:

1st. That there is no evidence that the deceased ever contributed anything to the support of any of the persons who would receive the amount which might be recovered under Section 353 of the Code of Civil Procedure of Alaska, as construed by the learned trial Court, or that any of them ever suffered any pecuniary loss by reason of his death.

2nd. There is no evidence in the record that the father or mother of deceased was living or that there was any next of kin of deceased living to whom any amount recovered could be distributed under Section 353 of the Code of Civil Procedure of Alaska as construed by the learned trial Court.

The only reference to next of kin is the following portion of the testimony of Joe Pazetti:

" Q. Did he have a family?

"A. He say so

" Q. Where did he say his family was?

" A. He say they are in California.

" Mr. Cobb. We object to this line of testimony for " the reason that it is wholly irrelevant. This is not a " suit brought by his family; it is brought by Mr. Jen- " nings, as administrator of the estate.

"COURT. I think the objection ought to be sus-
"tained." (*Tr.* 32.)

Note. If it be held that the objection to the foregoing testimony came too late and was not upon the proper ground, still the word "family" could not refer to the ancestors of the deceased, but only to his wife or children, and there is no claim that he ever had a wife or children.

The witness, continuing, testified as follows:

"Q. You say you saw him two or three days before
"he was killed and he was strong and healthy?

"A. He was healthy, I believe. I don't know he said
"he was feeling good. He talk about his father and
"mother——" (*Tr.* 34).

"Q. How do you know he was born in America?

"A. He told me and his father and mother——

"Mr. JENNINGS. We object to that; ask that it be
"stricken out as hearsay. I could not get at what he
"was driving at.

"The COURT. Proceed." (*Tr.* 35.)

Note. It does not appear that the Court ruled upon the above objection made by plaintiff in error. The answers, however, do not tend to prove that the deceased had a father or mother living. These answers are incomplete, and in order to make them support the contention that the deceased had a father or mother living, it would be necessary to add to each of the answers, so that they would read as follows: "He talk about his father and mother" *being alive.* "He told me and his father and mother" *were living in America.*

We respectfully contend that the Court could, with equal right, add to these answers, so that they would read as follows: "He talk about his father and mother" *being dead;* and "He told me and his father and mother" *were dead.*

The two conclusions above stated seem to be apparent from the record.

The defendant in error respectfully contends that the construction put upon Section 353 of the Code of Civil Procedure of Alaska to the effect that the amount recovered by the personal representative must be distributed to certain designated persons and that it does not become an asset of the estate is correct.

If such construction is correct, then it follows that the fact that there are next of kin and that they have suffered pecuniary loss from the death of deceased must both be alleged and proved.

The plaintiff in error bases his argument upon the fact that Section 353 of the Code of Civil Procedure of Alaska was taken from the laws of Oregon and is the same in legal effect as the statute of Oregon, and that the construction given by the Supreme Court of Oregon in *Perham v. Portland General Construction Co.,* 53 Pacific 14, is conclusively in favor of his contention that the amount that may be recovered is an asset of the estate.

The defendant in error respectfully contends that the statute of Oregon and Section 353 of the Code of Civil Procedure of Alaska are not in legal effect identical.

The statute of Oregon is as follows:

> "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person.—*Hill's Ann. Code,* Secs. 369, 371."

Section 353 of the Code of Civil Procedure of Alaska is as follows:

> "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed ten thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration, and when he or she leaves no husband, wife, or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person; but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper."

It will be observed that the law of Alaska expressly provides that in case there is a surviving husband or wife and children, the amount recovered shall not be an asset of the estate, but shall be exclusively for the benefit of the husband or wife and children.

It will also be observed that while the law of Alaska provides that the amount recovered, when there is a surviving husband or wife and children, shall be administered as other personal property, it expressly provides as follows: "But the plaintiff may deduct there-" from the expenses of the action".

The clear intention of the first part of this law was to change the law of Oregon in case of surviving husband or wife and children, and the provision that one claim only can be deducted from the amount recovered, in case there is no surviving husband or wife and children, shows that the same purpose was contemplated in the latter portion of the section and that the provision that the amount recovered shall be administered as other personal property was inserted for the purpose of determining the persons to whom it should be distributed.

The fact that long before the passage of either of the acts above referred to, statutes upon this subject in various forms and phraseology had been frequently interpreted and construed by decisions of many courts and that these decisions generally agreed that the amount recovered goes to the next of kin and not to the estate, is entitled to consideration in determining the

construction to be put upon Section 353 of the Code of Civil Procedure of Alaska.

In order to show the consideration given to this general rule, we call the attention of the Court to the following section of the Code of Civil Procedure of California and to the following decisions of the Supreme Court of California:

Section 377 of the Code of Civil Procedure of California is as follows:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The Supreme Court of California has, under this section, which makes no provision for the distribution of the amount recovered, rendered the following decisions:

1. *Munro v. Dredging Co.* 84 Cal. 515:

> "In relation to the seventh request of defendant, we remark that it related to a matter entirely immaterial in this case. The damages recovered are for the benefit of the heir or heirs, and do not constitute any part of the estate of the deceased. (*Leggott v. Great Northern Ry Co.,* 1 Q. B. Div. 599; *Chicago etc. R. R. Co. v. Morris,* 26 Ill. 400.) The action is a new one given by the statute, and the damages recovered are, as said above, for the benefit of the heirs. Clearly, they can be no part of the assets of the deceased." (528)

2. *Webster v. Norwegian Mining Co.,* 137 Cal. 400:

"The action is entirely statutory. If there were no statute there could be no action. At common law no such right of action existed. (*Burk v. Arcata etc. R. R. Co.,* 125 Cal. 368.) The administrator has the right to bring the action because the statute says so. He is made a statutory trustee to recover damages for the benefit of the heirs. As administrator of the estate he has no interest in the matter, for the fruits of any judgment he may recover do not belong to the estate. Those fruits pass to the heirs as statutory beneficiaries of the statutory trustee. They do not take them by way of succession. This statutory action was given for the benefit of the heirs of the deceased, and for no other purpose. It was enacted in order that they might compensate themselves for pecuniary injury suffered in the loss by death of a relative, and this being so the statute necessarily contemplates that there must be heirs of a deceased. If this deceased had no heirs, then this statute does not apply, and there can be no action; for there can be no statutory trustee if there be neither trust nor beneficiary."

3. *Burk v. Arcata & Mad River R. R. Co.,* 125 Cal. 368:

"In these cases the jury have been permitted to indulge in mere conjecture, that they may find some damage under the statute. It is said the fact that a right to sue is given implies that damages may be recovered, although no rights of plaintiffs have been violated. Confessedly, plaintiffs had no legal claim on deceased for anything, and he owed no duty to them to accumulate an estate and leave it to them. Let us consider upon what a sea of uncertainty the jury must embark: *1.* Would the deceased have had the health to work and accumulate, and would he have done so? He never had saved anything, and it does not appear that he could have done so; *2.* Might he not have married and have had chil-

> dren of his own who would inherit? *3.* Might he not by will have disinherited the plaintiffs; and *4.* Might he not have outlived them?''

The defendant in error respectfully submits that for the foregoing reasons, and for the reasons stated in the instructions of the learned trial Court (*Tr.* 358-369), the conclusion put upon Sections 31 and 353 of the Code of Civil Procedure of Alaska was correct and that the next of kin, and not the estate, would be entitled to the benefits of the action.

The fact that there were next of kin and that they suffered pecuniary loss must be alleged and proved.

The defendant in error cites in support of the last statement *Serensen v. Northern Pacific R. R. Co.,* 45 Federal 407, and the cases therein quoted.

We call the attention of the Court to the following statements from the opinion of the Court in this case:

> ''The decisions of the Supreme Court of Illinois are uniform to the effect that a declaration in an action brought under this statute should set forth that the deceased left a widow or next of kin.'' * * * (408)
>
> ''The authorities generally agree that the amount recovered in such cases goes to the widow and next of kin, or to the next of kin to the exclusion of the creditors. *Quin v. Moore,* 15 N. Y. 436, 437; *City of Chicago v. Mayor,* 18 Ill. 348-358. It cannot be it was contemplated that in any case the personal representative might recover a judgment for injuries resulting in death, and then afterwards institute an inquiry as to whether or not there was any one entitled to the amount recovered on this judgment. If it is necessary to prove on the trial there is a widow and next of kin, this fact should be alleged.

Certainly the defendant would have the right to controvert this fact.'' * * * (409)

''How can the pecuniary damages the widow or next of kin have suffered be determined? Is it sufficient to prove the killing of the deceased, and the negligence of the defendant? Undoubtedly such proof might justify the jury in finding nominal damages, but how much more?'' * * * (410)

''In the case of *Collins v. Davidson,* 19 Fed. Rep. 83, Judge McCrary, in instructing a jury, lays down the following as elements in estimating damages:

'' 'In determining this amount, if you come to the question, you may consider any evidence before you tending to show what was a reasonable expectation of pecuniary benefit to said heirs from the continuance of his life. The age of the deceased, his pecuniary circumstances, his habits of industry, his accustomed earnings, measure of success in business, and the like, as far as they appear in evidence, are proper to be considered.'

''In the case of *Howard v. Canal Co.,* 40 Fed. Rep. 195 Judge Wheeler says:

'' 'In this case the deceased had accumulated nothing for anyone up to the time of his death, in middle life. He was no more likely to accumulate property from then forward than before. The deprivation of his society, affection, or counsel is not to be considered. The actual, probable, pecuniary loss is all that the statute covers and can be allowed for. Upon the evidence, considering all the probabilities of his future, no just ground for finding that he would ever have accumulated any property for his brothers and sisters is apparent.'

''In the case of *Railroad Co. v. Barron,* supra, in speaking of the second section of this statute, the United States Supreme Court says:

'' 'The second restricts the damages in respect both to the principles which are to govern the jury and the amount. They are confined to the pecuniary injuries resulting to the wife and next of kin, whereas,

if the deceased had survived, a wider range of injury would have been admitted. It would have embraced personal suffering, as well as pecuniary loss, and there would have been no fixed limitation as to the amount.'

"So, when the suit is brought by the representative, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. If the deceased had lived, they may not have been benefitted; and, if not, then no pecuniary injury could have resulted to them from his death.

"From these authorities, and others that might be cited, it is evident that there must be some evidence showing that had the deceased lived, there would have accrued to the next of kin some property, or there was a strong probability he would or might have been of some pecuniary benefit to them. Nothing is allowed simply for the death of the deceased, separated from the pecuniary loss his widow or next of kin may suffer on account thereof." (411)

See also:

In re California Navigation & Improvement Co., 110 Federal 678.

The defendant in error submits that the judgment should be affirmed.

SHACKLEFORD & LYONS,

JOHN FLOURNOY,

Attorneys for Defendant in Error.

No. 1639

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE TREMONT COAL AND COKE COMPANY
(A Private Corporation),

Plaintiff in Error,

vs.

PATRICK J. SHIELDS,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[CLERK'S NOTE: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,
Plaintiff and Defendant in Error,

vs.

TREMONT COAL & COKE COMPANY (a Private Corporation),
Defendant and Plaintiff in Error.

[Names and Addresses of] Counsel.

DUDLEY G. WOOTEN, 405 Pioneer Bldg., and JAMES B. DOWD, 405 Pioneer Bldg., Seattle, Wash.,
Attorneys for Plaintiff and Defendant in Error.

SHEPARD & FLETT, Seattle, Washington, and BLATTNER & CHESTER, and L. B. da PONTI, National Bank of Commerce Building, Tacoma, Washington,
Attorneys of Defendant and Plaintiff in Error.

[**Summons.**]

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, Western District of Washington.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE COMPANY (a Private Corporation),

Defendant.

Action brought in said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court in the City of Seattle, County of King, State of Washington.

WOOTEN, DAVIS, GLASGOW & DOWD,
Rooms 401 to 406 Pioneer Bldg.,
Seattle, Washington,
Plaintiff's Attorneys.

The President of the United States of America, Greeting:

To Tremont Coal & Coke Company, a Private Corporation.

You are hereby summoned to appear in the Circuit Court of the United States, for the Western District of Washington, at the city of Seattle, within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you, ac-

cording to the demand of the complaint, now on file in the office of the clerk of said Court, a copy of which complaint is herewith served upon you.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, and the seal of said Circuit Court, this 30th day of April, 1907.

[Seal] A. REEVES AYRES,
Clerk.
By W. D. Covington,
Deputy Clerk.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I have personally served the within summons, together with the complaint in the within entitled action, upon the within named defendant by delivering to and leaving a true copy of the said summons and complaint with Charles E. Shepard, State Agent of the within named Tremont Coal & Coke Co. at Seattle, County of King, Western District of Washington, on the 1st day of May, 1907.

C. B. HOPKINS,
United States Marshal.
By Fred M. Lathe,
Deputy.

May 1, 1907.
Fees: $2.12.

[Endorsed]: Summons. Filed in the U. S. Circuit Court, Western Dist. of Washington. May 1, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE COMPANY (a Private Corporation),

Defendant.

Complaint.

The plaintiff in the above-entitled cause, complaining of the defendant, alleges the following as his cause of action herein;

I.

That the plaintiff is a citizen of the State of Washington, and of no other State.

II.

That the defendant is a private corporation organized under and by virtue of the laws of the State of Maine, having its principal office and place of business at Portland, Maine, and is a citizen of said State of Maine and of no other State.

III.

That said defendant owns and operates certain coal mines in the State of Washington, and in the Western Judicial District of said State, and has an agent, to wit, one Charles E. Shepard, who resides in the city of Seattle, King County, in said Western Judicial District of Washington, and is duly designated

by said defendant under the laws of said State as the person upon whom legal process may be served in the State of Washington.

IV.

That at all the times hereinafter mentioned defendant was the owner and operator of certain coal mines located at or near Wilkeson, Pierce County, Washington, and was engaged in coal mining and in excavating and removing earth and rock, for the purpose of sinking, digging and extending the necessary shafts, levels, drifts, and cuts in said mines in order to work the same for coal, and was charged with all of the duties and responsibilities towards its employees and servants imposed by law upon persons engaged in such business and operations.

V.

That at the times hereinafter mentioned the plaintiff was employed by the defendant in the capacity of what is known as a "hard-rock or quartz miner," to do digging and tunelling through the earth in order to reach the veins of coal, and he was engaged in tunnelling a drift or cross-cut from the lower level in said mine towards a vein of coal lying several hundred feet from said lower level; that said cross-cut or drift was approximately six feet by eight feet in size, and plaintiff and the other miners similarly engaged were working in shifts of eights hours each, two men to a shift; that plaintiff's regular shift was from eleven o'clock at night to seven o'clock in the morning; that the duty and labor of clearing away and removing from the said drift the rock and dirt taken down by each shift, according to the well-es-

tablished rule and custom of all properly conducted mines of a similar character, belonging to a different set of laborers called "muckers," and the duty and labor of protecting and supporting the top and walls of said drifts so as to prevent the caving and falling of stones and earth, according to said rules and custom, belonged to another set of workmen called "timbermen," and it was the direct, non-delegable duty of defendant to plaintiff to provide and maintain an adequate and competent force of such "muckers" and "timbermen" to perform said duties and labor, and to establish and enforce suitable rules and regulations for the proper performance thereof, and to regularly inspect said drift and the work being done therein, so as to provide and maintain a safe and suitable place for plaintiff and his fellow-miners to do their work as aforesaid.

VI.

That on July 27, 1906, at about the hour of 11 o'clock P. M., plaintiff went to work on his regular shift in defendant's mine aforesaid, at a point in said drift or cross-cut about 160 feet from said lower level of the mine, in company with the other miner on his shift; that since plaintiff's last shift of work in said drift, which ended at seven o'clock that same morning, considerable digging had been done in the face of said drift and fresh rock and dirt had been exposed in the walls and overhead, not visible when plaintiff had quit work in the morning and of which he had no previous knowledge or notice, and which rendered said place of work extremely dangerous and unsafe; that the rock and dirt dug down by pre-

ceding shifts had been allowed to accumulate in the drift so as to cover the floor with piles of loose stones and earth, rendering it very difficult to move about in the drift and impossible to escape in the event of caving; that the sides and top of said drift at that point and near there and especially said freshly exposed portion of the top wall were wholly unsupported by any sort of timbers or protection against caving and falling, although the same were freshly dug out and unsafe without such timbering and supports; and the drift was further obstructed and rendered unsafe and dangerous to move about in or to escape from by reason of the tracks in and along the floor of the drift being blocked up for a long distance with cars that had been allowed to accumulate and stand there; and plaintiff avers that in all of the aforesaid particulars the defendant was then and there wholly lacking and negligent in its due, reasonable and ordinary care and prudence for the safety of plaintiff, and especially in thus failing and neglecting to furnish and to maintain a reasonably safe place for him to work.

VII.

That within a few minutes after plaintiff went upon duty at the time and place last aforesaid and before he had time to discover the risk and danger of the aforesaid situation, or to escape therefrom in the obstructed condition of the drift before described, a large and heavy rock in the freshly exposed portion of the wall overhead, near the face of the drift, suddenly caved and fell in upon him, carrying with it a

large mass of dirt and stones, and completely crushing and burying him beneath their heavy weight, inflicting the wounds and injuries hereafter described; and even after he had been dragged out from beneath the first fall of rock and was lying on the floor of the drift helpless, waiting to be carried out as soon as aid could be brought, through the onstructions aforesaid along the drift, a second fall of dirt and rock fell upon him, inflicting additional wounds and injuries as hereafter particularly described, and plaintiff was permitted to lie there in the wet and cold a long time in great agony on account of defendant's delay caused by said obstructions.

VIII.

That as the direct and approximate results of the caving and falling of the rocks and earth in defendant's mine upon plaintiff as aforesaid, he sustained the following damage and injury, to wit: His left hip joint was dislocated and the neck of the thigh bone broken, the pelvis was fractured, the spine was badly contused and sprained, the left knee was broken and the ends of the upper and lower bones were crushed away, the left foot and ankle were crushed and broken, the left leg twisted out of place and shortened, in which condition it still remains, and his whole body severely crushed, bruised and shocked, causing great derangement and injury to his bladder and other internal organs, all of which injuries are of a permanent nature and have rendered plaintiff an incurable cripple, unable to walk or to perform any kind of labor; that he has endured and will continue through life to endure the most intense physical

and mental agony from said injuries, has been operated upon by surgeons five times in order to treat and relieve said wounds, has had many pieces of broken and decayed bone removed, has been in the hospital and under surgical treatment ever since the date of said injuries and is yet, and he is informed by his surgeons that it is probable that his left leg will *get* have to be amputated.

IX.

That in order to treat said wounds and injuries plaintiff has been compelled to employ physicians and surgeons at great expense, to wit, the sum of fifteen hundred dollars ($1500), and to remain in the hospital at Tacoma and Seattle ever since said injuries were received, now a period of nine months, at an expense of over five hundred dollars ($500), and his said surgical, medical and hospital expenses will continue for an indefinite period in the future, entailing a continuous outlay on that account the amount of which it is impossible to accurately estimate, but plaintiff believes and avers will be one thousand dollars ($1,000) additional.

X.

That at the date of said injuries aforesaid plaintiff was fifty-two years old, in perfect health, very strong and vigorous, with a life expectancy of at least twenty years, was a capable miner and earning and able to earn habitually wages at the rate of $3.00 per day, but that he has not been able since said date to labor or to earn any wages whatsoever, and will never again be able to perform any physical labor, which is the only kind of work he is capable of doing.

XI.

That at the time plaintiff entered the employ of defendant as aforesaid, defendant required him to pay the sum of $1.00 on account of medical and hospital services to be rendered to him by defendant in case of sickness or injury, deducting the same from his wages, and thereupon, as a part of the said contract of employment, agreed and became liable to defray all of plaintiff's expenses on that account during his said employment, but that defendant has wholly failed and refused and neglected so to do, and has paid no part of the same.

XII.

Plaintiff says that the aforesaid injury and damage were sustained by him without his fault, negligence or omission of care and duty, but wholly, solely and proximately by the direct negligence and failure of duty on the part of defendant in this, to wit: That defendant's agents, servants and employees in charge of said mine were wholly inexperienced and incompetent in the management and operation of mines and reckless in the conduct, inspection and operation of said mine at Wilkerson; that defendant wholly failed to comply with the rules and regulations provided by law for the inspection, safe guarding, clearing, timbering and otherwise prudently conducting said mine; that it was negligent and regardless of its legal duty in failing to provide for the safe, proper and prudent timbering of the walls of rocks and dirt therein, and especially at the time and place aforesaid, and in failing to maintain an adequate and competent crew of "timbermen" for that purpose; that

it was negligent in failing to provide and maintain an adequate and competent crew of "muckers" to clear away the dirt and rock from said drift as the same were dug out by the miners, and to enforce proper rules and regulations for so clearing away said materials, and in permitting cars and other impediments to the safe and convenient ingress and egress to and from plaintiff's place of work aforesaid to accumulate in said drift, thereby obstructing the same, and rendering it very difficult and dangerous to move about therein and next to impossible to escape therefrom in case of accident as aforesaid; and, generally, defendant was negligent in failing to provide and keep a reasonably safe place for plaintiff to work at his employment aforesaid, to his damage and injury as aforesaid.

Wherefore plaintiff prays for judgment against defendant as follows:

1st. For permanent injuries causing loss of wages and total disability to work and to earn wages, as aforesaid, the sum of fifteen thousand dollars ($15,000).

2d. For medical, surgical and hospital expenses, past and prospective, as aforesaid, the sum of three thousand dollars ($3,000).

3d. For mental and physical pain and suffering, past and future, as aforesaid, the sum of ten thousand dollars ($10,000).

4th. For all costs and disbursements in this behalf incurred and expended.

WOOTEN, DAVIS, GLASGOW & DOWD,
Attorneys for Plaintiff.

United States of America,
District of Washington,—ss.

Patrick J. Shields, being duly sworn, deposes and says, that he is plaintiff in the foregoing complaint; that he has read the same, and knows the contents thereof, and that the same is true to his own knowledge.

PATRICK J. SHIELDS.

Subscribed and sworn to before me this 30th day of April, 1907.

[Seal] JAMES B. DOWD,
Notary Public in and for the State of Washington, Residing at Seattle.

We hereby consent that service of all subsequent papers except writs and process may be made upon us at our offices below stated.

WOOTEN, DAVIS, GLASGOW & DOWD,
Attorneys for Plaintiff, Office Address: 403-405 Pioneer Bldg., Seattle, Wash.

[Endorsed]: Complaint (Action for Damages). Filed this 30th day of Apr., 1907. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States, Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE COMPANY (a Corporation),

Defendant.

Answer.

Comes now the defendant in the above-entitled action, and answering the complaint of the plaintiff herein, says:

I.

That it has no knowledge or information sufficient to form a belief relative to the matters alleged in paragraph I of said complaint, and therefore denies the same.

II.

That it denies each and every allegation contained in paragraph 5 of said complaint, save and except that defendant admits that the plaintiff herein was in the employ of the defendant on the 26th day of July, 1906, and was engaged in the work of an expert hard rock miner.

III.

That it denies each and every allegation contained in paragraph 6 of said complaint, except that defendant admits that on the 26th day of July, 1906,

the plaintiff herein was in the employ of the defendant as an expert hard rock miner.

IV.

That it denies each and every allegation contained in paragraph 7 of said complaint, excepting that defendant admits that on or about the 26th day of July, 1906, the plaintiff was in the employ of the defendant, and while at work in one of its tunnels he was injured.

V.

That it has no knowledge or information sufficient to form a belief relative to the allegations and matters contained in paragraphs 8, 9, 10 and 11 of said complaint, and therefore denies each and every of said allegations.

VI.

That it denies each and every allegation contained in paragraph 12 of said complaint.

FIRST AFFIRMATIVE DEFENSE.

Further answering the complaint of the plaintiff, and as a further and first affirmative defense thereto, the defendant says:

I.

That the plaintiff is now and was on the 26th day of July, 1906, a man of mature years, and in the full possession of his senses and faculties, and is now and was then skilled and experienced in the occupation of a miner.

II.

That the dangers and conditions which the plaintiff alleges were the cause of his injury, were open,

apparent and obvious, and were in fact known by the plaintiff, or would have been known by him had he exercised the ordinary use of his senses and faculties, and that the plaintiff assumed all the risk of injury from the same.

SECOND AFFIRMATIVE DEFENSE.

Further answering the complaint of the plaintiff, and as a further and second affirmative defense thereto, the defendant says:

I.

That the plaintiff is now and was on the 26th day of July, 1906, a man of mature years, and in the full possession of his senses and faculties, and is now and was then skilled and experienced in the occupation of a miner.

II.

That the injury of which plaintiff complains was caused wholly or in part by the negligence and want of care on the part of the plaintiff.

Wherefore defendant prays that it may go hence without day and that the plaintiff take nothing of the defendant by his said action, and that the defendant do have and recover of the plaintiff its costs and disbursements herein.

TREMONT COAL & COKE COMPANY,
By F. S. BLATTNER,
F. H. KELLEY,
HARVEY L. JOHNSON,
Its Attorneys.

State of Washington,
County of Pierce,—ss.

Otis D. Swain, being first duly sworn, on his oath says: That he is the agent and local manager of the defendant, The Tremont Coal & Coke Company, a corporation, and that no officer or agent of the said defendant corporation competent to make verification in its behalf, is at present within the State of Washington or this District; that as such agent and general manager he is particularly informed of the matters and facts set forth in the within and foregoing answer, and therefore makes this verification for and in behalf of the defendant corporation; that he has read the within and foregoing answer, knows the contents thereof, and that the same is true.

OTIS D. SWAIN.

Subscribed and sworn to before me at Tacoma, this 15th day of May, 1907.

[Seal] HARVEY L. JOHNSON,
Notary Public in and for the State of Washington,
Residing at Tacoma.

The services of the within and foregoing answer by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of this court, this 16th day of May, 1907.

WOOTEN, DAVIS & DOWD.

[Endorsed]: Answer. Filed in the U. S. Circuit Court, Western Dist. of Washington. May 22, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States, Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE COMPANY (a Corporation),

Defendant.

Reply.

Comes now the plaintiff herein, and replying to the answer herein of the defendant, admits, avers and denies as follows:

I.

Referring to paragraph I of that portion of said answer which is set forth as a "First Affirmative Defense," plaintiff admits that he is now and was on the 26th day of July, 1906, a man of mature years, and in the full possession of his senses and faculties, and that he is now and was then skilled and experienced in the occupation of a hard rock miner.

II.

Referring to paragraph II of said "First Affirmative Defense" set forth in the answer, plaintiff denies each and every statement and allegation therein contained.

III.

Referring to paragraph I of that part of said answer set forth in the "Second Affirmative Defense," plaintiff admits the allegations therein contained.

IV.

Referring to paragraph II of said "Second Affirmative Defense," plaintiff denies the same and every part thereof.

Wherefore, plaintiff prays judgment as in his complaint set forth.

WOOTEN, DAVIS & DOWD,
Attorneys for Plaintiff.

United States of America,
District of Washington,—ss.

Patrick J. Shields, being duly sworn, deposes and says, that he is the plaintiff in the foregoing reply; that he has read the same, and knows the contents thereof, and that the same is true to his own knowledge.

PATRICK J. SHIELDS.

Subscribed and sworn to before me this 27th day of May, 1907.

[Seal] JAMES B. DOWD,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received copy of the within reply and service of same admitted this 28th day of May, 1907.

JNO. W. ROURKE,
Attorney for Defendant.

[Endorsed]: Reply. Filed this 7th day of June, 1907. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the United States Circuit Court, Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE COMPANY,

Defendant.

Motion for Direction of Verdict for Defendant.

Now comes the defendant at the close of the testimony and moves the Court that a verdict be directed for the defendant in this action.

The grounds upon which the motion is based are as follows:

1. The plaintiff was a man of wide experience in coal mining. The dangerous condition of the roof of the tunnel at the point where and the time when plaintiff was injured was obvious and apparent. Being obvious plaintiff (a) assumed the risk of such danger; (b) was guilty of contributory negligence in remaining in a position where the falling rock would strike him.

2. One of plaintiff's duties while working as a rock miner in the tunnel in question was to examine the tunnel carefully at the time he started each shift in which he worked to see if the blasts of the next

previous shift had loosened any rock in the roof or elsewhere so as to become dangerous, and upon finding any such rock, to remove it, or otherwise to make all such unsafe places safe, and in performing such duty he assumed the risks connected therewith.

3. The testimony shows that the defendant had no notice of the condition of the tunnel at the time of the accident, and also that the condition had been changed previous thereto, rendering the roof of the tunnel at that point dangerous and unsafe. The defendant cannot be charged with negligence in regard to that condition while the plaintiff seeing and appreciating the entire situation is charged knowledge of such condition.

4. The character and formation of the rock in the tunnel in question was such that it was not required to render it safe that timbers should be used; hence, the statutory requirement in regard to furnishing timbers where required had no application, so that the defense of the assumption of the risk is uneffected by such statute.

5. There was plenty of opportunity for the plaintiff upon seeing the dangerous and unsafe roof at the point where he was injured to have kept himself from under the loose rock and have been perfectly safe, while engaged in the work of testing its condition and doing whatever was necessary to make it safe. Notwithstanding this, the plaintiff remained in a position under such loose and dangerous rock and was injured by its fall. His selection of a dangerous position when a safe place was open to him was

voluntary and constitutes negligence which defeats recovery.

HARVEY L. JOHNSON and
SHEPARD & FLETT,
Defendant's Attorneys.

#6. That the injury to plaintiff in this case was the direct and proximate result of the negligence of a fellow-servant.

Motion denied.

Defendant excepts.

C. H. H.

[Endorsed]: Motion for Directed Verdict. Filed in the U. S. Circuit Court, Western Dist, of Washington. Apr. 2, 1908. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS

vs.

TREMONT COAL AND COKE COMPANY (a Corporation).

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages as the sum of Twelve Thousand Dollars ($12,000).

CHAS. F. EGGERT,
Foreman.

[Endorsed]: Verdict. Filed in the U. S. Circuit Court, Western Dist. of Washington. Apr. 2, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1525—LAW.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE COMPANY (a Provate Corporation),

Defendant.

Judgment.

This cause coming on regularly for trial on the 25th day of March, A. D. 1908, the plaintiff appearing in person and by his attorneys, Wooten & Dowd, and the defendant appearing by its attorneys, Harvey L. Johnson and Shepard & Flett, and both parties having announced ready for trial, there came a jury of twelve men, to wit: Charles F. Eggert and eleven others, who being duly tried, impaneled and sworn, and the testimony on behalf of the plaintiff and also on behalf of the defendant having been introduced and heard and argument of respective counsel thereon having been duly presented to the Court and jury, and the jury having been duly and fully instructed by the Court and having retired to consider of their verdict, at the conclusion of their de-

liberation, to wit: on April 2, 1908, returned and filed herein their verdict in words and figures substantially as follows, to wit:

"We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at the sum of twelve thousand dollars ($12,000.00). (Signed)

CHAS. F. EGGERT,
Foreman."

Now, therefore, by reason of the law and the premises, the Court being now duly advised, it is hereby ordered, considered and adjudged by the Court that the plaintiff, Patrick J. Shields, do have and recover of and from the defendant, Tremont Coal & Coke Company, a private corporation, the sum of Twelve Thousand Dollars ($12,000), lawful money of the United States of America, together with legal interest from this date and his costs and disbursements herein to be taxed, and that the plaintiff do have execution therefor.

Done in open court, this 16th day of April, A. D. 1908.

C. H. HANFORD,
Judge.

[Endorsed]: Judgment. Filed this 16th day of April, 1908. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the United States Circuit Court, Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE COMPANY,

Defendant.

Motion for New Trial.

Now comes the defendant by Harvey L. Johnson and Shepard & Flett, its attorneys, and moves that the verdict and judgment herein be set aside and a new trial be granted to the defendant upon the following grounds:

1. Error in law occurring at the trial and excepted to at the time by the defendant; as shown by the minutes of the Court:

(a) In the admission of evidence objected to by the defendant and especially evidence of the condition of the tunnel where plaintiff was injured with reference to the timbering of same after the accident; also the evidence of the condition of the tunnel at other places than the point where the accident happened, with reference to timbering of the tunnel; also the evidence of the custom of the management of the defendant's mine with reference to employment of timbermen and muckers at any time testified to on the trial;

(b) In the conclusion of evidence offered by the defendant;

(c) In instructions of the Court to the jury, excepted to by the defendant and especially with reference to the holding by the Court that the defendant was negligent as a matter of law and in what such negligence consisted;

(d) In the Court's refusal to give instructions to the jury requested by the defendants and which refusal was then excepted to by the defendant, which instructions were in writing and filed in said action;

(e) In the Court's refusal to grant a nonsuit as requested by the defendant at the close of plaintiff's testimony, which refusal was duly excepted to by the defendant;

(f) In the Court's holding as a matter of law that the defendant was guilty of negligence and thereby taking from the jury the consideration of that question; for the reason that there was not sufficient evidence to justify such holding; also that the ground upon which the court held the defendant guilty of negligence, to wit: in not examining the roof of the tunnel at the point where the plaintiff was injured after the blast had been fired and before the plaintiff went into the tunnel, for the purpose of ascertaining the condition of such tunnel with reference to safety, was not in issue by the pleadings and was not a ground of negligence charged in plaintiff's complaint against defendant, and such holding so far as it is sustained by the evidence is a fatal variance in the allegations of negligence of the complaint; and also that there is no evidence to show that such omis-

sion by the defendant was negligence, but on the contrary the uncontradicted evidence produced on the trial was to the effect that the examination of such condition was part of the miners' duty.

(g) In the Court's refusal to direct a verdict for the defendant at the close of testimony in the case, which refusal was duly excepted to by the defendant.

2. Insufficiency of the evidence to justify a verdict, especially in that there was no evidence to justify the jury in finding that the plaintiff did not assume the risk of the work in which he was engaged at the time of the injury and also that he was not guilty of negligence which directly contributed to the injury received; also in finding for the plaintiff against the uncontradicted evidence produced by the defendant as to the custom of miners for their own safety in approaching the breast of a tunnel immediately after a blast has been fired and the instructions of the Court on that point.

3. That the verdict was contrary to law.

4. Excessive damages appearing to be given under the influence of passion or prejudice on the part of the jury.

This motion is based upon all of the files and records herein and upon the minutes of the Court at the trial.

HARVEY L. JOHNSON and
SHEPARD & FLETT,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

William H. Flett, being duly sworn, says that he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing motion, knows the contents thereof, and the same is meritorious and well founded in law as he verily believes.

WM. H. FLETT.

Subscribed and sworn to before me this 9th day of April, 1908.

[Seal] JOHN E. BURKHEIMER,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of the within Motion for New Trial received and *due hereby* acknowledged this 5th day of May, 1908.

WOOTEN & DOWD,
Attorneys for Plaintiff.

[Endorsed]: Motion for New Trial. Filed in the U. S. Circuit Court, Western Dist. of Washington. May 9, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

United States Circuit Court, Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE COMPANY (a Corporation),

Defendant.

Memorandum Decision on Motion for a New Trial.

Filed June 27, 1908.

In the argument on the motion for a new trial, a good deal of stress is laid upon the fact, as therein stated, that the plaintiff was probably a more experienced and competent miner than the foreman under whose direction he worked. I think that this may be conceded without in any wise helping the defendant's case. All the evidence tended to prove that there was an absolute lack of intelligent superintendence of the workings in the mine. This was so apparent that the Court deemed it useless to require the jury to struggle in an attempt to agree as to this or that particular charge of negligence. I am still of the same opinion and believe that if the jury could have acquitted the defendant as to each and every one of the matters specified in the argument on this motion, the result would necessarily have been the same, that is to say, the defendant was guilty of negligence in carrying on the dangerous work of making ex-

cavations in a mine by means of blasting, without competent superintendence. The questions affecting the affirmative defenses were properly and fairly submitted to the jury for decision, and there has not been pointed out any ground which I deem sufficient to justify the Court in setting aside the verdict.

Motion denied.

C. H. HANFORD,
Judge.

[Endorsed]: Memorandum Decision on Motion for a New Trial. Filed June 27, 1908. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,
Plaintiff,

vs.

TREMONT COAL & COKE CO.,
Defendant.

Order [Denying Motion for a New Trial, etc.].

The defendant's motion for a new trial heretofore filed herein having been submitted on written briefs by the respective parties, and the Court having considered the same, it is

Now hereby ordered, that the said motion be, and the same is hereby denied; to which ruling the defendant excepts and its exception is allowed.

C. H. HANFORD,
Judge.

Dated, July 2, 1908.

[Endorsed]: Order Denying Motion for New Trial. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 2, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the United States Circuit Court for the Western District of Washington, Sitting in Seattle.

No. 1525—AT LAW.

PATRICK J. SHIELDS,
Plaintiff,

vs.

TREMONT COAL & COKE CO.,
Defendant.

Bill of Exceptions.

This is an action at law by the plaintiff to recover damages from the defendant for personal injuries received by the former in defendant's mine, situated in Pierce County, Washington.

The cause came regularly on for trial on the 25th day of March, 1908, before the Honorable T. H. Hanford, Judge of the above-named court. Plaintiff appeared in person and by his attorney, D. G. Wooten, of Wooten & Dowd. The defendant appeared by its

attorneys, Wm. H. Flett, of Shepard & Flett, and Harvey L. Johnson.

The jury having been duly empanelled, the following proceedings were had and testimony taken, to wit:

Plaintiff's Evidence in Chief.

To maintain the issues in behalf of the plaintiff, Dr. E. M. BROWN was produced as a witness, and, having been duly sworn, testified as to the nature and extent of the injuries plaintiff sustained, but, as no question is made as to their extent, nor as to the amount of damages awarded, said testimony is omitted.

[Testimony of R. B. Hamilton.]

R. B. HAMILTON, a witness produced by plaintiff, having been sworn, testified as follows:

My name is R. B. Hamilton and I live near Keefport, in Kitsap County. Am a miner, fifty-eight years old, and have followed mining most of the time since 1869. I have worked as a common miner and as boss or superintendent, and am familiar with the customs and regulations that attain in quartz mining and with the safeguards that are generally used for precautions against danger. A pit-boss is a foreman who has charge of the mine. I work in the mine of the defendant at Wilkerson, in Pierce County and from sometime in June until sometime in August as a common miner, but did not know Mr. Shields, except by sight. In the tunnel where Shields was hurt they worked three shifts of eight hours each, and two men on a shift. I worked from seven o'clock A. M.

(Testimony of R. B. Hamilton.)

until three in the afternoon. The shift that followed me worked from three P. M. to 11 P. M., and Mr. Shield's shift was from 11 P. M. until seven the next morning. Steven Geneger worked with me and Mr. Gillis worked with Shields. Mr. Carlson and another man worked from three o'clock P. M. until eleven. At the time Shields was hurt we were drilling and blasting out a tunnel to get to a vein of coal. At that time the tunnel was about three or four hundred feet in length, I should think, and eight feet wide and six feet high. It is about one hundred and fifty feet from the mouth of the tunnel to where Shields was hurt. The day Shields was hurt I had worked from seven o'clock in the morning until three in the afternoon, and put in several blasts. We would drill until time to go off and would load our holes and fire them as we went out, and did not go back to see what the effect of the blast was.

"Q. Mr. Hamilton, what was the condition of the roof at the point where you were at work when you left there near the breast of the cut?

"A. I considered it bad.

"Q. In what respect?

"A. Danger of caving.

"Q. Well, I will ask you what the character of that danger was, as to being immediate?

"A. Well, I considered it dangerous right at the present time.

"Q. Did you make any investigation in reference to it?

(Testimony of R. B. Hamilton.)

"A. I looked at it, tried to pry a chunk down that I was afraid of.

"Q. Well, what was it particularly that you thought was dangerous?

"A. Well, I was more afraid of a large stone that there was slips around that looked to me like it cut it off and I was afraid it would fall down."

That was before I fired the blast and I tried to pry it down, but could not move it. It was about two and *a feet* from the bottom of the stone up to the top, and pretty near three feet wide and would weight a ton and a half, possibly two tons. I could just see the bottom of it and couldn't tell at that time how large it was, because I could only see the slips going up that looked like they cut it off. "Two slips went up and they ran back and one turned a little and it kind of came together on the back end. It ran up in front and another slip cut it off in front. That is what made me afraid of it, on account of that slip cutting it off in front, and I was afraid it might drop out." This rock was from three to three and a half feet from the breast of the tunnel.

"Q. What was the condition of the roof generally around this rock?

"A. Well, if that rock would stay there the balance of the rock would stay up I think. Of course you could see other smaller slips, but in that case this rock acted as a key and if this stayed there the balance would stay. The rock was visible all of my shift and I worked under it from seven in the morning.

(Testimony of R. B. Hamilton.)

There were no timbering in the tunnel at that point, nor anywhere near there.

"Q. I will ask you whether or not in your judgment, based upon your experience and observation as a miner, it was a proper and prudent thing to do, for the reasonable safety of the men at work in that tunnel, to have had timbers at any point along the distance that you have described (between the entrance of the tunnel and the place where Shields was hurt)?" "A. Yes, sir, it was.

"Q. Why.

"A. Because it caved many times. We ran through about twenty or thirty feet back from the breast where Mr. Shields was hurt a short vein of coal and there were soft rock laying next to the coal, and that caved *oftime* in good quantities."

"Mr. JOHNSON.—Q. That is the point you say that timbers should have been placed?

"A. Yes, sir, that is one point.

"Mr. FLETT.—We ask to have that all stricken out as irrelevant and immaterial.

"The COURT.—Motion is denied."

To which defendant excepted and exception was allowed.

"Mr. WOOTEN.—Q. Were there other places in that distance of one hundred and fifty feet that should have been timbered?

"A. Except on the breast."

The defendant objects to any testimony that the tunnel required timbering except at the particular place where the plaintiff was hurt.

(Testimony of R. B. Hamilton.)

"The COURT.—I think the jury have a right to be informed as to the whole length of that tunnel from one length of it to the other, as to what the conditions were and what was the usual and scientific operation in extending that tunnel. The objection is overruled."

To which the defendant excepted and exception is allowed.

"Q. I will ask you whether or not you ever saw a timber crew at work timbering there?

"A. No, sir.

"Q. Do you know whether or not the defendant company had a timber crew? A. I don't.

"Q. Did you ever see one?"

The defendant objects because immaterial and moves that the above answers be stricken out, which was overruled by the Court and defendant excepted, and the exception was allowed.

"Q. Did you see any material for putting in timbering in the mine?"

Same objection, same ruling and exception, and exception allowed.

"A. No, sir. Except some that I put in afterwards.

"Q. Did you ever hear any of your fellow workers ask for timber?

"A. I heard my partner say to the foreman, Mr. Wildiz, 'John, there had ought to be some timbers in here.' "

That occurred while we were working between where we got this coal slip and where Mr. Shields got

(Testimony of R. B. Hamilton.)
hurt. No timbers were furnished in reply to this request.

Defendant than moved to strike out this testimony for the reason that it does not relate to the place of the accident; which motion was denied, and the defendant allowed an exception.

If the point where this large rock was had been timbered the accident could not have happened. I was never informed by Mr. Wildiz where I could get timbers in case I wanted them. In case I wanted timbers I would have gone to Mr. Wildiz.

"Q. Whose duty is it in the mine to investigate the condition of the roof and the walls, with reference to the necessity for timber?

"A. It is the duty of the foreman, and also the duty of the men working there."

If the miner sees a place in the mine he thinks ought to be timbered he should go to Mr. Wildiz, and it would be Mr. Wildiz' duty either to furnish timbers and instruct the miners to timber it up, or furnish timber men to do it. It is the duty of the foreman to see to the clearing away of the rock from the face of a tunnel after it has been blasted.

I visited the place where plaintiff was injured before any work had been done there the next morning, and found the rock that I had seen in the roof laying on the floor of the tunnel with loose rock under it.

"Q. Did you ever see any copies of rules and regulations for the mines posted up at any point about the mine?"

(Testimony of R. B. Hamilton.)

To which question the defendant objected, as immaterial and irrelevant, which objection the Court overruled and defendant was allowed an exception.

"A. I did not."

Cross-examination by Mr. JOHNSTON.

This rock was just a little bit to the right-hand side of the center of the top of the tunnel. Where a tunnel is being driven through the rock, the rock miners have to drill holes and put in their shots, and if there be any loose rock in the breast or roof or any place around, usually his duties are to sound it and pick down what is loose, and whenever it is practicable to get the loose rock down, that is really the thing to do. A slip is an opening between the rock, an opening or crack, with a little clay in it and there was one on each side of this rock and they came back and nearly together at the further end, from the breast and up to the breast of the tunnel, and another slip ran across the tunnel cutting this rock off and that is why I was afraid of it; and the rock was hanging with the small end up. Of course if there was a large end up it would act as a key, but it didn't look good to me as I could see the slip on the back end of the rock, which was broken a little bit higher than the bottom and I could see the slip had a tendency to cut it off into a kind of wedge shape.

"Q. Of course, where a rock is in that condition the natural consequence to be expected after a blast is that it will be *l* loosened more?

"A. Yes, sir, it would."

(Testimony of R. B. Hamilton.)

It is possible to put in timbers right up to the breast but in blasting hard ground, as this was, it is rulable to keep your timbers back at least four or five feet from the breast. You keep your timbers up just to keep your ground safe. If you can keep them back twenty feet we would rather do it, because then our shots are not cutting the timbers to pieces. If you put the timbers closer than twenty feet they are liable to cut them sometime. I think that we were averaging about ten inches to a foot on each shift, blasting rock out of the face of the tunnel. I don't know what my shorts did, but the tunnel had probably gone in between eight and twelve inches when Shields went in after I came off of my shift. At this particular point it was solid rock, it was granite. We would work eight hours and come out and just as soon as the smoke blew out the other men would go in and work, and when their smoke blew out the others would go in. That rock could have been drilled enough to blow it down without getting under it. This rock that we were working through was sandstone.

[Testimony of Lewis Carlson.]

LEWIS CARLSON, a witness produced by plaintiff, testified as follows:

I am thirty-three years old and followed mining for about seven years as a common miner. I am familiar with the methods and rules prevailing in mines with regard to the various duties of employees and the general rules that govern mines. I started in

(Testimony of Lewis Carlson.)

about the 12th or 13th of August, 1906, working for the Tremont Coal & Coke Co., in their mine at Wilkerson, and worked about fourteen days. I was employed there when Shields was hurt. I was on the afternoon shift from three to eleven. Mr. Hamilton and his partner were just ahead of me and Mr. Shileds and Mr. Gillis followed me. The day Shields was hurt I worked from three to eleven, breaking rock in the tunnel. When I went off duty at eleven o'clock that day the roof was pretty bad. It needed timber all right. It was not so bad that a man could not work there, but then it was bad enough. It was liable to come down any time. Just before going off that shift we fired six or seven blasts in the face of the tunnel. The roof was in a bad condition. Not very safe for a man to work there unless it was timbered.

"Q. I will ask you whether that tunnel was timbered any point from the entrance to the place where the injury occurred?

Defendant objects, as immaterial; and the objection is overruled and the defendant allowed an exception.

"A. The entrance to the tunnel; yes, sir.

"Q. Were there any timbers at any point between the entrance and the point where this accident occurred? A. There were a few sets.

"Q. Where abouts were they?

"A. They were at the entrance.

(Testimony of Lewis Carlson.)

"Q. From that point, a distance of about one hundred and fifty feet, to where Shields was hurt, were there any? A. No, sir.

"Q. From your experience in mines, I will ask you whether for the reasonable safety of the men it should have been timbered? A. Yes, sir.

"Q. Now, I will ask you, from your knowledge as a miner, what if anything was proper to be done along that tunnel for the reasonable safety and protection of the men?

Defendant objects, because the question is not with the issues. Objection overruled, and defendant allowed an exception.

"A. I don't quite understand the question.

"Q. From the character of the roof in the tunnel at the point where the accident occurred and the intervening distance between the entrance and where the accident occurred, what ought to have been done that was not done for the reasonable safety of the men working there?"

Defendant objects, *because calls* for a place other than where the accident occurred.

"The COURT.—I overrule the objection on the ground that the entire space of the tunnel is a matter that is a subject of inquiry in the case.

Defendant excepts and exception is allowed.

"A. Timbered; that is the only thing."

The timber should have been put in in regular sets, two posts and a cap. During the time that I was at work there I was not furnished with any timbers and

(Testimony of Lewis Carlson.)

did not see any about there. I asked Mr. Wildiz for timbers several times and he said that *that* the timbers would be down there, but I never saw any. I asked for timbers the last shift before Mr. Shields came on the day he was hurt. I wanted to fix up that place where Mr. Shields got hurt. Mr. Wildiz said that timber was not necessary.

"Q. During the time you were at work there were you ever furnished with any list of rules or did you ever see any rules posted for the government in the operation of the mine?"

Defendant objects, because it is immaterial and the objection is overruled; and defendant excepted and is allowed an exception.

"A. No, sir."

I never saw any regular muckers in the mine, nor any timbermen. When I went on duty at three o'clock in the afternoon I noticed a large rock in the roof of the tunnel near the breast and called the foreman's attention to it. Mr. Wildiz was the foreman. That was before four and five o'clock.

"Q. What did he do and say, if anything?

"A. Well, he sounded the rock and pronounced it safe."

The rock did not look very safe to me. This rock was about two and a half or three feet from the breast of the tunnel when I last saw it. There were two seams and the end of the rock was hanging down. That was what I was afraid of, that it would be liable to drop at any time, and there was water seeping

(Testimony of Lewis Carlson.)

through the seams and it was cut off in front. The blasting that I did on the last shift would naturally jar the rock and make it more dangerous. When I came off the shift at eleven o'clock I saw Mr. Shields and Mr. Gillis in the bottom of the slope coming down as I was on my way up.

Cross-examination by Mr. JOHNSTON.

Each shift would drive the tunnel on an average of about eight inches to a foot. I would go in at three in the afternoon and drill holes in the rock during the eight hours of my shift and when I got through drilling would put powder in the holes and *right* the fuse and *lease* the mine. The rock might have fallen on my shift, but, to the best of my judgment, I did not *not* think it would. If I had believed it would I would have timbered it. I never saw any timbermen there and supposed we had to do our own timbering. It was not necessary to take the rock down, but if it had been taken down it would be the foreman's place to say so when we notified him. It is the duty of muckers to clear away the rock and blasting in the face of the tunnel, but not his duty to take the rock from the roof of the tunnel or walls or face. It is the duty of the timberman to do the timbering whenever the foreman tells him to, but not the timberman's duty to take rock out of the roof. It is the miners' duty to get the rock out of the roof, and out of the face of the tunnel, and out of the wall. I thought this rock would stand during my shift, but I would have timbered it had I the timbers. It could have tumbled

(Testimony of Lewis Carlson.)

down on my shift as well as the next shift, though of course it looked as though it might not fall on my shift; I didn't work exactly under that rock, but kept away from it during all the time I was working there and did not get under it. I thought it might fall and that is the reason I did not get under it. I was partly under the rock and if it had fallen it might have struck me. I could not help myself and I had to get some place to drill my holes in. After the seven blasts that I put in had gone off the rock would, in my judgment, become loosened and more dangerous. On my way out I met Gillis and told him that that rock was loose and to be careful. I tried to get the rock down but it would not come and that is the reason why I thought it would probably stay up there.

Redirect Examination.

I told Gillis to be careful about that rock, it might be jarred loose. I saw the hole out of which this rock fell after the accident and it was timbered at that time.

[Testimony of John Gillis.]

JOHN GILLIS, a witness produced by plaintiff, testified as follows:

I am 37 years old and have followed mines since the spring of '96 or '97. The duties of the miner in rock mines is to drill holes, load them with powder, put in the fuse and cap and light the fuse which causes the explosion to br*ake* the rock. The duty of the mucker is to take away the broken rock. The duty of the

(Testimony of John Gillis.)

timbermen is to put in timbers to hold up roofs that are not safe and rock that is insecure and not safe to work under. Timbermen also might drill a short hole if he finds that the rock is not high enough to put his post in place and blast it himself or tell the foreman, if they are not capable of doing that themselves; and he will send a competent man to blast away the rock that is in the way of the timberman. The timbermen then puts in a set or whatever is necessary to secure the ground. A set is two posts set up in the tunnel and then a cap goes across. In some mines the miners themselves are supposed to *pt* in their timbers and in some mines there are no muckers furnished and the miners have to do their own mucking. The miners are paid the higher wages. I was employed by the Tremont Coal and Coke Co., at Wilkerson; went to work June 20, 1906, and worked from that time until the 27th of July, 1906. I was present when the accident happened to Mr. Shields and was his partner on that shift. Mr. Carlson and his partner were on the shift immediately preceding us and Mr. Hamilton and his partner preceded Carlson. The day of the accident Mr. Shields and I went on at 11 P. M.

"Q. Just explain when you went in the condition you found existing there and when happened?

"A. I went into the tunnel where we were working and found the roof in very bad shape, at a point about three and a half or four feet from the face of the tunnel. I went in a few minutes ahead of Mr.

(Testimony of John Gillis.)

Shields and was examining that place with my light, when Shields came in, and I told him that this roof looked dangerous and that he had better proceed to examine it and secure it if possible. And while I was examining it Mr. Shields hung his light a little further on the left-hand side of the tunnel, looking in, and turned as I spoke and said he would go out and get the hammer, meaning an eight-pound hammer to pound the roof all over. I told him that I had carried in the hammer and that it was here. Mr. Shields turned around to get the hammer when the roof dropped. A piece of rock dropped and threw Shields down and hit me a little on the head and threw me over on the side and cut my head and dazed me and knocked my lamp out of my cap and it didn't go out and I picked my lamp up and heard Mr. Shields say: 'For God's sake, take this off from me.' When I staggered up dazed there was another fall of rock and I looked around in a dazed condition and Mr. Shields was under the rock. There was a piece of rock on his shoulder. The first thing I did I rolled that off his shoulder. It was pressing him down upon the rock that was right across his leg and up against his breast and stomach and this rock was pressing down upon the other. Then I rolled off the small rock. The blood was flowing out of my head and I was in a dazed condition and didn't realize how badly he was hurt. He told me that I could not get that large rock off alone, I had better go and get help. I tried to move it, but it was a little too much for me.

(Testimony of John Gillis.)

I went out to the pump, knowing there was a pumpman there and that he would get help. I went out and called to him and told him that Mr. Shields had been caught in the cave-in and asked him if he would not get help. There were two other men working in the mine somewhere and they came in and took the rock off of Mr. Shields."

It was perfectly dark in there without the lantern. I was about five minutes ahead of Mr. Shields coming in. He was out putting on his jumper. In the center of the roof there was a piece of rock that protruded a little more than the rest that had slips going up on each side of it somewhat like a wedge, tapering off at the top. The bottom was the widest part of it forming the roof and all around it had seams and slips that it didn't look like it would hold or that it would be safe in a man to take great chances and work underneath it. The wedge end of it protruded up towards the roof, and its base hung about eight inches below the roof. It was three and a half or three feet, or it might be four feet from the breast of the tunnel going. All around this rock were slips and seams like the blasting of a roof of a hole that had begun to crackle. I don't think I had been there ten minutes when the first fall came. I don't know if Mr. Shields was there more than five minutes. He had been looking around with his light and said that it didn't look good; that was sure. That was about the words he said when I called his attention to it and he started to come out from there after hanging

(Testimony of John Gillis.)

his lamp and said he would go and get the hammer and was going to pound the rock. I do not think it was the big rock that first fell. He had turned around, seemingly to go for the hammer at first and was going away from the rock when I called his attention to the hammer and he kind of faced me to come over to get the hammer where I was standing. A step or two across to get the hammer would be all that was necessary. There was not a minute's time between the two falls of rock. Mr. Shields was under the rock about fifteen minutes or twenty minutes before we could get it off. As I was coming in Mr. Carlson was coming off the shift and met me and told me to examine the roof. I don't believe Mr. Shields heard it because he was taking the tools out of the car. There was considerable rock all strewn around where we were making it hard to get around. We could not get very well into the breast of the tunnel and do any work comfortably without moving all this blasted rock. I should judge there were three or four car-loads of this loose rock on the floor, which had been blasted down possibly the two shifts before we went in. During the time I was there the workmen were not furnished with any material for timbering. I asked Mr. Wildix, the foreman or pit-boss, for timbers, and he told me there was no necessity for timbers and when there was he would furnish them. I asked for timbers at a place somewhere previous to this where we went through a soft slip of ground with some coal scat-

(Testimony of John Gillis.)

tered through it and told Mr. Wildiz it was not safe and ought to be secured and timbered, and he said he would furnish timbers and put them in there, but no timbers were put in and we went beyond that place.

"Q. Mr. Gillis, was there during the time you were there or up to the time of the accident any crew of timbermen at work as far as you saw?"

Defendant objects, because it is immaterial; and objection overruled, and exception allowed.

"A. No, sir."

After examining this place and finding it was not safe to work what I would have done and what we would have done that night and inform the foreman of the dangerous condition. The condition existing there required timber. There had been two shifts at work there since our last shift, the one that started at seven in the morning and the one at three in the afternoon. When we went off duty at seven o'clock that morning the roof was in fair condition. There was no immediate danger but I could see that there was a change of ground coming. I mean by change of ground that there was ground with rock and more slips coming in. At seven that morning there might be any necessity for timbering, but when we came *of* that shift we had holes in the roof to take down the roof and make it the regulation height*h*. It had an upward and back hole right around where this roof was mad, and of course I could not say—I didn't see what effect our shot had on the roof after

(Testimony of John Gillis.)

that. That was as I went off the shift. We put two shots in the roof and three or four more shots besides, but I didn't go back to see what the effect was, and had not been back there during the day. The only rules I saw posted up was some rules regarding the bell signals. I didn't see any rules regulating the duties of the employees in the mine and how the work should be done. Mr. Wildiz was the foreman and he was the man I should go to for tools or material or anything I need and the man that directed where I should work. Mr. Wildiz employed me, and he was the only one I ever got any instructions from.

Cross-examination.

[Testimony of Patrick Shields.]

PATRICK SHIELDS, plaintiff, being sworn, testified as follows:

I am the plaintiff in this case; I am 43 years old. I am a miner. I commenced practical mining in 1870; had been in coal mines before that. I was in mines when I was a little boy. I have worked principally in coal mines, but have worked in quartz, gold, copper and iron mines. I have labored around mines and in and out of them, and been timberman and foreman and superintendent of mines too, part of the time. The greater part of the time I was common miner. I am familiar with the methods and rules that attain in mines generally in regard to the method of tunneling and timbering and the various

(Testimony of Patrick Shields.)

duties and relations of employees. I went to work for the Tremont Coal and Coke Co. on the 9th of July at noon and labored around the top until the 18th of July, and then I went to work in the rock tunnel, where I was injured. The duties of a miner is to break rock under orders of the shift boss or foreman, or to mine coal. I was employed as a miner to break rock in the face of the tunnel. I didn't see any timbermen there. I told the boss, John Wildiz, that we ought to have some timbers in there occasionally to take care of that ground, that rock, when it is getting loose, so as to take care of that. From the character of the roof and the rock, especially where I was hurt in the breast of the tunnel, there should be false timbers there all the time. There ought to be a few timbers, emergency timbers, so that a loose rock or any part that is dangerous to work around you can put an emergency prop under it and it will designate which way it is to be taken down or what is to be done with it. Perhaps it is not to be taken down. I was never furnished with any timbers while I was at work there. The first shift I went on I asked my foreman, "Where are the timbers?" He said he didn't know. "We haven't been using any yet," and I looked around and said, "There are some places you certainly ought to be using some." I went to work on the shift at eleven o'clock, and had been in the mine not ten minutes before I was hurt. I could not have been there five minutes when I was caught.

(Testimony of Patrick Shields.)

"Q. What occurred there? State in your own way what happened after you came to the breast of the tunnel.

"A. The coincidence is something I will never forget and I remember all about it. I went up on one side of the tunnel the way miners—kind of an unwritten agreement which side of the tunnel they work on. Generally keep to the right or left. We always do that. I don't care where it is, what ground, he takes the safe side of it, no matter which side it is, and of course we take next to the pillars. The middle is always supposed to be the weaker point, and that we had no timbers or anything, naturally that place there that should have been timbered that was not timbered and we would take the advantage of being careful that way. I went up alongside and the rock that had been blasted from the shift prior to my coming on and muck was laying around there perhaps eighteen inches, say from nothing to eighteen inches in height of this much growing gradually up to the face or breast, and I touched some rocks going along. I could not walk straight when I came to that ground because of this. I went on and hung the light on the face of the breast and John called my attention, he says, 'This roof is looking pretty bad to-night.' I says, 'Is it? Well, then, we will have to take a look around and see what it is,' and I turned around and that light had been turning. Any man knows that when he hangs it on the face it gives a reflection and it shines

(Testimony of Patrick Shields.)

on the roof, and I looked around and says, 'Yes, John, that is pretty bad looking, don't look good to me.' I says, 'I am going up for the hammer; I will go for the hammer and examine that.' It is as heavy rock or ground, it is big ground; that is what miners call it; shell ground, big crack. You can't sound it with a pick or light instrument. You have to have something heavy, and hold one hand to it and jar it and it is the jar that you go by, from the natural instinct of practice, and I was going after it. He says, 'I have got the hammer here,' and I, of course, knew it was on his side and started to go over, and just as I was going a rock or slip fell down and struck me and threw me down and twisted me in this position. Threw me down this way and slung this under and throwed my body back. I remember the position I was in; I never can get into it again. While I was down struggling I didn't know what was causing it that I could not get out because I didn't think I was hurt bad. I says, 'For Christ's sake, John, come and get me out,' and he rushed, and it was lucky that he was stunned himself, for if he hadn't been badly stunned we might have been both caught, but he got a butt in the head and was dazed and didn't get back very quick. I hollered two or three times to him before he came to me. It was all done in probably twenty seconds, and the second fall, this big rock they tell about, that big rock should never have fallen on me. If the ground had been taken care of on the last two shifts it would

(Testimony of Patrick Shields.)

never have fell on me. It would have been stopped there on the timber and I would have been a well man. And that is just how the thing occurred, exactly."

The rock that I was going to test is part of the rock that fell on me, but the rest of the ground around there is kind of ticklish too. It was not that rock that knocked me down first. It was another shell of a rock adjoining it. It was not twenty seconds or half a minute between the two falls. On my previous shift I had gone off at seven o'clock that morning and the condition of the roof at that time was not good. There was always cracks there. The ground lays in layers; the sand rock lays in layers, fairly good, just about the average, same way as any other. Before Gillis and I went off that morning we probably had five holes drilled. That morning the breast was hanging over pretty well, and we put in our holes to take this heavy off. Put in the corner holes deeper and kept the round up to the center. I told John, my foreman, that the rock was changing, there was streaks getting into it, black streaks. Of course, that meant a change. Had the appearance of softer and black places through those water seams and the lay of the country which was laying on about forty-five degrees. It kind of seemed to be as though it was going to strike the coal pretty soon. Rock was changing and I presumed we were going to strike that vein of coal and I remarked in the office the day before I got hurt that I

(Testimony of Patrick Shields.)

believed there was going to be coal struck in that place and there was a change coming. After I got off that morning if they did good work they would be in from 22 to 24 inches further. The rock fell behind me. The place where I was struck was about four or four and a half feet from the face, perhaps five; I don't, but I was trapped right with the head towards the face of the rock. The fact that there was an accumulation of muck or rock at the breast of the tunnel had considerable effect upon my examination of the condition that existed there. The rock was shot all over and rock and chunks here and there and you had to move it out of your way. It leaves you kind of stumbling, but if it was out of the way a man could move safely, generally safer. The shifts prior to mine should have taken care of that ground by timbering, or if the boss ordered them to do so, put up a glory hole and shoot it down, but in any way of looking at it it should have taken care of by being timbered. It is the foreman's duty when he hear*d*s a complaint from miners that examine the mine to have it repaired. If that was not done right along in other mines, why mines would be a slaughter-house.

Cross-examination.

I started coal mining in 1870 and have been working in and around mines ever since. In Kansas I held the position of superintendent, or foreman, or pit-boss about four and a half years. I contracted taking out coal at Rich Hill, Missouri, for about thir-

(Testimony of Patrick Shields.)

teen months. In Montana I held a superior position in quartz and coal mines. I was superintendent and manager of the mines there about four years; this was in Belt, Montana I was miner, and timberman, and foreman in Butte, Mont., in quartz mines, about fifteen months. I worked in coal mines at Gilt Edge, Mont. Opened a coal mine there for the Gilt Edge Mining Co. I have worked in mines in Illinois, Missouri, Iowa, Kansas, Utah, Montana and British Columbia. The blasts in the face of the tunnel make what we call an overbreak; that is the vibration and concussion of the shock may shake it back quite a ways. The shots that are put in at the end of every shift necessarily change the condition of the tunnel immediately back of the face, and if they are deep shots they will make a greater change, and when a man goes back in the tunnel after one of the shifts comes off he naturally expects to find a new condition at the face, and when the ground begins to get bad over a man's head he ought to have it taken care of by reporting to the boss or laying off work until it is repaired or something done. He is not supposed to commit suicide. It is *is* not always proper to take down a loose rock like this was. If I was bossing it I would see that it would not be let down. I would not be hiring muckers to have miners driving glory holes up over the work as was described to be done. That can be done, but it is not mining. Whenever a man is ordered to drive a place eight by six he is supposed

(Testimony of Patrick Shields.)

to drive it that width and if you commence to make an overbreak the boss will very soon tell you about it, as he *doesn't the* muckers to be hoisting up muck that is dropped in the mine. If the place is dangerous the miner has no right to be there, and if he makes up his mind it is not a safe place to be he should not work under it but should notify his superior. I did not hear Carlson tell Gillis about this rock being loose. If I had I would not be he*ar* today. If I had had Gillis' information I don't think that I would be here to-day. I was intending to take the hammer and examine the rock carefully and if I had found it in an unsafe condition to work under I would have reported to the boss or sent my partner to notify the boss that there was a big piece of ground that should be either timbered or taken down at his orders. I went to the face of the tunnel and hung my light to it and stepped back and on the side about four feet from the face of the tunnel, and just as I was going to go over towards Jack the rock hit me on the shoulder and twisted me around with my face towards the face of the tunnel. The rock fell from around the center of the roof. It was not from the edge of the roof, because I was edging pretty close myself and it fell just as I was going over towards him in that stooping position. Gillis was on the right-hand side of the tunnel and I was on the left-hand side. I wanted the hammer to sound the rock. That is customary, to take it and stand around in the safest place to get and reach it

(Testimony of Patrick Shields.)

with the hammer and sound it; and if it sounds solid you are supposed to be safe, and then you advance from there and sound the other and keep yourself on safe ground. You pass on your own judgment. If it sounds right to you you advance further and sound the ground further on, and if you find some ground that is not safe, that you know by the sound of the hammer is not right, you take other ways to prove it. You get a long bar and reach over, and if you see a crack some place you try and pry it down. You are not going to walk under it. The condition of this rock lead me to feel that I wanted to test it. The roof didn't look good to me that night. I saw that there was a change had taken place there during my absence of sixteen hours and the other shifts working there, and there was a general change took place and I noticed it, but had not had time to take care of it or do anything with it. The change that had taken place was that the roof was getting bad generally all around, the roof and the face of the tunnel. The formation of that country all lays pitting and pitching on an angle of forty-five degree or such a matter, and there are slips and layers in the sandstone that run all one way and when they get cracks across this way to the breaking of that ground, we watch them. I can't tell you how wide the big rock was. I knowed that it was high. I was partly under it. This testing of rock is something I have to do right along in rock mining. A man is always looking out for his head. If I had

(Testimony of Patrick Shields.)

orders to take that rock down I would try my bar on it and if it didn't come down and was dangerous to stand under and drill it I would put in small timber consisting of a post and cap under it, and commence to drill and as soon as you light the fuse you knock your false cap out and it comes down. I don't take down rocks without orders if I think it is a big heavy rock. It would not be doing my duty if I did so, but if I see a cave coming in that I believe is heavy and extraordinary I notify the boss that the ground is getting heavy and that I think there is a big cave coming and the boss gives instructions if he wants to take it down. If any irregularity comes in the roof through heavy ground or caving in he notifies his boss. He is instructed to take out so much ground, eight by ten or ten by twelve or whatever it may be, and is not expected or allowed to go over that if possible. The walls must be kept as uniform to the size as possible, on account of the muck. You must have it regular. If I had gotten my hammer against the rock and discovered that it was loose I would have gone out or sent my partner and notified the boss; I would have stopped right there. This roof all showed to be cracked and cross-cracked, slips going this way, angling off. They were going different ways, making the ground irregular and unsafe looking. There were cracks on both sides of this rock, but in the center there were bigger cracks, more noticeable than any. I didn't have time to make a thorough exami-

(Testimony of Patrick Shields.)

nation of it. That indicated that the rocks were loose and that there was a change since I was there before. These cracks had come in. Every time I came in on my shift I would examine the roof and know where I was going to be working. I didn't have time to examine it but I saw that a change had taken place. I was going to examine it but got caught before I did examine it. I mucked two or three cars of broken rock when foreman John Wildiz, ordered me never to do it again, that they hired me to break rock and not to muck. If I had been mucking I would not have been under that rock. If I was mucking I would expect somebody to examine it before I went to mucking. A mucker is not bound to go and muck unless the ground is examined ahead of him, but the miner makes his own examination and finds if the ground is bad. The mucker works under the miner. The miner tells him where to clean the rock out, and if it is dangerous tells him to keep out and wait until it is fixed.

Thereupon the plaintiff through his attorney, Dudley G. Wooten, announced to the Court that his evidence was concluded and rested his case.

[Motion for a Nonsuit and Judgment of Dismissal, etc.]

Thereupon the defendant, through its attorney, Harvey L. Johnson, moved the Court for a nonsuit and judgment of dismissal on the following grounds, to wit:

First: That the testimony in the case fails to show a cause of action or establish a cause of action against the defendant.

Second: That it appears from the testimony that the dangers and risks as a result of which the plaintiff was injured, *as* were such as were necessarily assumed by the plaintiff as an incident to his employment.

Third: That it appears that the plaintiff was a man of large experience and fully appreciated and understood the dangers of his employment, and in doing the work he was engaged in at the particular time the injury occurred his own acts contributed to his injury.

Fourth: That the plaintiff at the time of his injury was engaged in the work of making a dangerous place safe, and for this additional reason he assumed all of the risks of his employment.

Fifth: That the immediate cause of the plaintiff's injury was the negligence of a fellow-servant working with him at the time.

And be it remembered, that after argument upon the foregoing motion, the same was overruled and denied by the Court, to which action of the Court the defendant then and there duly excepted, and an exception was allowed.

Defendant's Testimony in Chief.

[Testimony of John Wildiz.]

And thereupon, to maintain the issues in its behalf, JOHN WILDIZ was produced as a witness in behalf of the defendant and being sworn, testified as follows:

I am the John Wildiz who has been referred to by the witnesses in this case as having been superintendent for the Tremont Coal & Coke Co. at the time Pat Shields was injured. The entrance to that tunnel was about twelve feet, and the rock is a kind of black rock which is not solid, and that is the reason I had to put three sets of timbers in tiers to hold it up; that is right at the mouth of the tunnel. And as soon as we got through there we struck sand rock, solid as a bell all the way through with the exception of a little seam or water crack that never softened the rock any. In ground like that we had in that tunnel it never did need any timbers and never will need any timbers. I have worked in coal mines all my life, going on to twenty-seven or twenty-eight years now. My mining has been confined to coal mines, rock-tunnels and laying track. I started in as a mucker and laid track for many years as boss track layer, and was foreman and superintendent. In driving a tunnel such as this one by blasting we must expect that some rock or rocks will be jarred loose, and when the shot goes off that leaves loose rock. A man has to go thre with a pick or certain tools and pull that down and examine as he goes. If a miner knows anything about mining he will take a pick or certain

(Testimony of John Wildiz.)

tolls so that he can reach ahead of him as he goes and examine the roof and sides a certain distance from the place where the charge is located. Of course, every miner will expect that something may be loose and not safe for him to go in unless examine the place or falls, and as he goes with the pick he can rap and tell what is loose and what is solid. The miner should not go right into the face without making preliminary tests as he proceeds, because they are not safe for there may be something hanging down that wants to be taken down or secured before going too far, and by going straight in he takes chances certainly, not knowing what may be ahead of him. It is just like if we walk in the dark we may fall down in a hole. I heard the testimony of Mr. Carlson yesterday that he asked me for timbers on the shift before *F*ields was hurt. Mr. Carlson did not make such a request of me. Mr. Gillis did not ask me for timbers for a place in this tunnel near the entrance. I never was asked for any timbers there, because we had timbers laying there. I never intended to put in square sets because they would not need them.

Cross-examination.

I was inside foreman at that time and had charge of the work in the tunnel and control over these men, and whatever was to be done in that tunnel I had the general direction of it. I was last in that tunnel between three and four o'clock of the same afternoon of the day on which Mr. Shields was hurt and went

clear through the tunnel to the breast where the work was going on, as it is my business to do.

[Testimony of Ellis Roberts.]

ELLIS ROBERTS, a witness produced by the defendant, being sworn, testifies as follows:

I am a miner and was working for the defendant at the time of the accident to Mr. Shields in the capacity of pillarman. I started in working as a miner when I was a boy 11 or 12 years old and am now 49, and have had about the same experience that Pat Shields has had. I have been through this tunnel. I was last in it about two weeks ago. I examined the formation of the rock at the place where the accident occurred and from there to the entrance. I regard that as good safe tunnel from the entrance all the way through. The rock had not changed any up to the time I went in there a couple of weeks ago. It was sandstone rock. My experience on the ground has been quite a great deal in both rock and coal. I have seen a good deal of it and have seen the same kind of work and I can take anybody to see the same work at the present time in the Wilkerson Coal and Mining Co.'s mines. They had larger tunnels and larger tunnels that are standing there for years in the same kind of ground and are just as firm as the day they were put through. This mine is about a half a mile from the defendant's mine. The other tunnels I refer to are not timbered. My past experience shows that they don't timber such work ordinarily. I heard the next day after the accident that there had

(Testimony of Ellis Roberts.)

been a man hurt there and my partner and I out of curiosity went in to see what kind of a looking place it was. If I was blasting rock in a tunnel I never go in there until the smoke is cleaned out and generally take my pick with me and examine the ground as I advance as carefully as I can. I take my pick and tap the roof all around to see if it is solid or if there has been any shake around there from the shot which I left and advance that way until I reach the face. If it is solid ground like that was the rock is liable not to be cut back from the face. Under ordinary circumstances it is liable to shake a little piece most anywhere. There might be a little piece that a man would overlook. There would be a liability of rock falling from the center as a rule, but would not look for much coming off the sides.

"Q. What have to say of the action of a man going clear into the face of the tunnel without making any preliminary test, going in right after the blast had been discharged?

"A. Well, that is something I didn't do.

"Q. Why?

"A. Because I understand that in this tunnel there were three shifts, and it is always a very good act for a man to be very careful after another shift because he don't know exactly how it was left there. I would never go up to the face without a thorough examination first back of it. When it is worked by one shift they have better judgment as to its position previous to going in there as to how they left it be-

(Testimony of Ellis Roberts.)

fore. When there are other shifts on they should use extraordinary precaution as to its condition before advancing.

"Q. Why?

"A. Because there might be something loose there, as they were not in there last and there must have been shots put in there."

The last thing a miner does before leaving the face of the tunnel at the end of their shift is to light their shot, and that will cause the condition to change. There is no timber between the point of the accident and the entrance of the tunnel.

Cross-examination.

I was working for defendant as a miner at the time the accident occurred, drawing pillars in the coal vein; that is, after a place is worked out you take the pillars out and let the whole thing drop down. My work was in another vein about a thousand or fifteen hundred feet away, but connected with the tunnel where Shields was. I never did any digging or blasting in this tunnel.

[Testimony of Romanio Marquette.]

ROMANIO MARQUETTE, a witness produced by defendant, being sworn, testifies as follows:

I am 41 years and have been working as a rock miner 24 years. I remember the time plaintiff got hurt in the mine. I was working for the company there; I mean I worked in the same mine, but not in the same company. I started that tunnel; worked there about two months before plaintiff was injured.

(Testimony of Romanio Marquette.)

I worked there a few days after the plaintiff got hurt. It was a solid sand rock formation. There was timbering in the mouth of the tunnel where we started. I put a set there myself because there is a kind of soft rock or slate we had the timber to keep up. That was before we got into the solid rock and there was no timbering after that. The time I saw the tunnel shortly after the accident I don't think it was necessary to put timber in the rock tunnel in order to make it safe, because there is no timber there yet. My answer is based on my knowledge and judgment and experience as a miner. After a shift has just come off when I go into the mine, before I go into the face, I will take the pick and look around and see if there is any loose rock around in the top and try to get them down. If I can't get them down with the pick, if I see it is loose and dangerous for me to work under it, I try to take it down and if I can do nothing else I put up a little shot and get it down. I put powder in and get it down. I have to make this examination in order to see if the place is a safe place to work in. The last thing a shift does when it leaves a rock tunnel, it generally shoots a half hour before quitting time. The men following are the first to go in after the shot is fired, and if you shoot a heavy shot maybe the ground would be loosen behind in the top ten or fifteen and may be sometimes twenty-five feet. When a miner goes in a tunnel after a shot has been fired it is his duty to take a pick and look in the roof first and pick the loose rock down.

Cross-examination.

I was not working in this tunnel when Shields got hurt, but I went in there with the eleven o'clock shift a day or two after he got hurt.

[Testimony of George Morris.]

GEORGE MORRIS, a witness produced by the defendant, being sworn, testifies as follows:

I live at Wilkerson and am now in the livery business. I worked thirty-eight years as a miner. I have been in the rock tunnel where Shields was hurt. Was through there about three weeks ago but was never there before. I observed the formation of the rock in the tunnel and the character of rock does not require timber at all, as it is a very solid formation of sand rock, but I didn't see any timbers except at the entrance of the tunnel there were four or five sets. It is the duty of a rock miner if he goes into the face of the work after a blast has been discharged by the previous shifts, he secures his way in and sounds the roof with his pick very carefully and cautiously and would not go clear into the face first, but he will examine his way in; all practical miners will. If there has been a round of holes fired it is necessary for *a* miners to be very cautious in going into their work. I mean by round of holes a round of blasts, including the shift's work. He should use a rock pick. It is the proper tool to use in sounding rock, by all miners. A pick has the sound to sound the rock, which the hammer has not. The hammer is not the proper ar-

(Testimony of George Morris.)

ticle to sound the rock with according to my experience in rock mining. The pick is held in the hand and you examine it as if you were going to pull the would go clear into the face first, but he will examine rock, and you would sound it here and there and work your way in sounding it as you go. If after making these tests you discover that there is a loose rock there you take those loose pieces down, unless there is a body of heavy ground. The practical miner will detect heavy ground. If the ground was bad or loose it would have a bad sound, but if it was solid the pick would bound off of it. There is a difference to a practical miner in picking in heavy ground and loose rock. An experience miner can tell from the appearance of the rock whether it is loose. I have worked in the Wilkerson mine and seen the formation there.

Cross-examination.

I am at present running a livery-stable at Wilkerson and have been for a year and nine months and have done hauling for the defendant. I have never been in the tunnel in which Shields was hurt until three weeks ago.

Plaintiff's Rebuttal.

[Testimony of R. B. Hamilton.]

R. B. HAMILTON, a witness produced by the plaintiff, being sworn, testified:

I testified while on the witness stand before that I visited the scene of this accident the next morning.

"Q. I will ask you whether or not you did any work there towards the timbering that place where the rock had fallen out?

"Q. I will ask you what if anything you did towards putting up timbers at that point the next morning after the accident?"

Defendant objects, because irrelevant and immaterial, which objection the Court overruled and the defendant excepted and was allowed an exception.

"A. I put in two stulls—put in two stulls across the place there where this large rock fell out, and put some lagging on top of it and filled in on top of the lagging the best I could."

[Recital Relative to Testimony, etc.]

This concluded the testimony, and the foregoing constitutes all of the testimony taken in the case, and both parties having rested, the case is argued to the jury by counsel for the respective parties. After the argument of counsel and before the Court charged the jury, counsel for the defendant moved the Court to instruct the jury to find a verdict for the defendant upon the following grounds, to wit:

"Now comes the defendant, at the close of the tes-

timony, and moves the Court that a verdict *he* directed for the defendant in this action.

"The grounds upon which the motion is based are as follows:

"1. The plaintiff was a man of wide experience in coal mining. The dangerous condition of the roof of the tunnel, at the point where and the time when the plaintiff was injured, was obvious and apparent. Being obvious, plaintiff (a) assumed the risk of such danger; (b) was guilty of contributory negligence in remaining in a position where the falling rock would strike him.

"2. One of plaintiff's duties while working as a rock miner in the tunnel in question was to examine the tunnel carefully at the time he started each shift in which he worked, to see if the blasts of the next previous shift had loosened any rock in the roof or elsewhere so that it became dangerous, and, upon finding any such rock, to remove it or otherwise to make all such unsafe places safe, and in performing such duty he assumed the risks connected therewith.

"3. The testimony shows that the defendant has no notice of the condition of the tunnel at the time of the accident, and also that the condition has been changed previous thereto, rendering the roof of the tunnel at that point dangerous and unsafe. The defendant cannot be charged with negligence in regard to that condition, while the plaintiff, seeing and appreciating the entire situation, is charged with knowledge of such condition.

4. The character and formation of the rock in the tunnel in question was such that it was not required, to render it safe, that timbers should be used, and the statutory requirement in regard to furnishing timbers where required has no application, so that the defense of the assumption of the rick is unaffected by such statute.

"5. *That* was plenty of opportunity for the plaintiff, upon seeing the dangerous and unsafe roof at the point where he was injured, to have kept himself from under the loose rock and have been perfectly safe while engaged in the work of testing its condition and doing whatever was necessary to make it safe. Notwitstanding this, the plaintiff remained in a position under such loose and dangerous rock and was injured *it* its fall. His selection of a dangerous position, when a safe place was open to him, was voluntary and constitutes negligence which defeats recovery.

"The last sentence I wish to modify so that it will read as follows: 'His selection of a dangerous position, when a safe place was open to him, was voluntary and constitutes negligence which defeats recovery.' I simply wish to add to that:

"His selection of a dangerous method in which to investigate such dangerous roof, when a safe method was open to him, also constitutes negligence which defeats recovery."

"And on the further ground that the in*jry* to the plaintiff in this case was the direct and proximate result of the negligence of a fellow-servant."

The foregoing motion having been argued to the Court, the same and each and every ground thereof was overruled, to which ruling of the Court the defendant then and there excepted and was allowed an exception.

[Instructions Requested by Defendant.]

Thereupon the defendant, before the Court had given his charge to the jury and while the jury was still in the box, requested, in writing, the Court to charge the jury as follows:

"1. I instruct you that ordinarily the defendant is bound to use reasonable care in furnishing a reasonably safe place for the servant in which to work, but that where, in the exigencies and progress of the work the condition is constantly changing, it is not incumbent upon the defendant that the safety shall be continuous at every moment of the time, and where such place becomes unsafe and the plaintiff in the exercise of his duty undertakes to make it safe, then I charge you that he assumes all of the risks incident to such undertaking, and if he is injured while engaged in such undertaking, he cannot recover."

Which instruction the Court refused to give to the jury and defendant excepted and was a*nn*lowed an exception.

The defendant also at the same time and place requested the Court to charge the jury as follows:

"2. I further instruct you that if you find from the evidence that the plaintiff upon discovering the

condition of the roof of the tunnel at the point where he was injured just prior to such injury knew or ought, in the exercise of ordinary care to have known, that the roof at said point was in a dangerous and unsafe condition, then I charge you that it was negligence for the plaintiff to remain under such unsafe and dangerous roof as he did so that when it fell it struck him and caused the injury complained of and such negligence directly contributed to the injury received, and plaintiff cannot recover in this action."

Which instruction the Court refused to give to the jury and defendant excepted and was allowed an exception.

The defendant also at said time and place requested the Court to charge the jury as follows:

"3. If you believe from the evidence that the tunnel referred to by the witnesses was being driven through solid sandstone rock and that the roof and walls of the tunnel up to the place of the injury were of such a character and such condition that they would remain intact without the support of timbers, then I instruct you that it was not necessary to furnish timbers and any testimony to show such request and refusal is immaterial and furnishes no basis upon which the plaintiff can attribute negligence to the defendant at any time."

Which instruction the Court refused to give to the jury and defendant excepted to the refusal of the Court and exception was allowed.

The defendant also at the same time and place requested the Court to charge the jury as follows:

"4. The defendant was not bound to adopt any particular method or system in the prosecution of its work. The fact that other mines may or may not have furnished timbermen and muckers would not impose upon this defendant the duty to do so. The defendant had a perfect right if in its judgment it saw fit so to do, to require the miners to perform not only the services of miners but also those of muckers and timbermen, and if you find that the defendant in this case adopted this system rather than the system of furnishing special timbermen and muckers, then I charge you that the defendant is not guilty of negligence in not furnishing timbermen and muckers to assist the miners and such work devolved upon the miners."

Which requested instruction, the Court refused to *f* give to the jury and defendant excepted and was allowed an exception.

The defendant, at the same time and place, also requested the Court to charge the jury as follows:

"5. You are instructed that the testimony in this case shows that the plaintiff was a man of wide experience in the work of mining and is therefore necessarily charged with a knowledge of the ordinary risks and dangers incident to the business. If you believe from the testimony that the plaintiff could have made a careful inspection of the condition of the roof of the tunnel at the place where he was injured without placing himself in a position of safety, and that he voluntarily went to the face of the tunnel, hung his lamp upon a rock and then stepped back to examine the roof and after having done so decided to go across

the tunnel for any purpose whatsoever and by reason of having gone into that position of danger he was injured, I charge you that such action on his part constituted negligence which contributed directly to the injury and your verdict must be for the defendant."

Which instruction the Court refused to give to the jury and defendant excepted and was allowed an exception.

The defendant also requested the Court to charge the jury as follows:

"6. If you believe from the evidence that after discovering the dangerous and unsafe condition of the roof of the tunnel at that point where he was injured, that in proceeding to make such dangerous and unsafe place safe, it was not necessary for him to use timbers, but that the loose rock could safely have been removed and taken out without the use of timbers, then I charge you that the question of whether or not he had timbers furnished him is immaterial and furnishes no grounds upon which to impute negligence to the defendant."

Which instruction the Court refused to give to the jury and the defendant excepted and was allowed an exception.

The defendant also requested the Court to charge the jury as follows:

"8. The evidence discloses that plaintiff was a man of extensive experience as a miner. If you find from the evidence that the dangerous and unsafe condition of the roof of the mine at the point where he was injured was, just prior to the injury, obvious,

patent, and apparent to him, or ought to have been in the exercise of ordinary care, then I charge you that plaintiff must be held to have appreciated the situation and assumed all risks connected therewith, and to remain under such defective rock when a place of safety was open to him, if you so find, was negligence, and if you further find that such negligence directly contributed to the injury received, plaintiff cannot recover and your verdict must be for the defendant."

Which instruction the Court refused to give to the jury and defendant excepted and was allowed an exception.

The defendant also requested the Court to give the *j* jury the following additional instruction:

"1. I charge you that if you believe from a preponderance of the evidence that the custom of miners in going into a tunnel immediately after blasts have been put off, they go in cautiously toward the breast of the tunnel and as they approach the breast examine carefully all surroundings, especially the rock in the roof of the tunnel to see whether the conditions bearing upon its safety or unsafety have been changed by reason of such blasts, and if you find that the plaintiff failed to do so in this case, I charge you that the plaintiff is guilty of contributory negligence, which defeats his recovery in this action, and your verdict should be for the defendant."

Which additional instruction the Court refused to give to the jury and defendant excepted and was allowed an exception.

The defendant also requested the following additional instruction be given to the jury:

"2. I charge you that if you find from the evidence that the witness Gillies, who was working as a partner of the plaintiff in the rock tunnel at the time plaintiff was injured, was guilty of negligence in not notifying him of the danger, knowledge of which had been imparted to him by the men on the former shift, and if you believe from the testimony that the plaintiff would not have gone into this dangerous place had he been so notified by Mr. Gillies, then I instruct you that the negligence of Gillies was negligence of a fellow-servant and the plaintiff cannot recover."

Which additional instruction the Court refused to give to the jury and defendant excepted and exception was allowed him.

Thereupon, at the conclusion of the argument to the jury by counsel, the Court orally instructed the jury as follows, to wit:

[Instructions of the Court to Jury.]

It is the province of the jury in a lawsuit to decide all controverted questions of fact in the case, to weigh the testimony, when there is conflicting evidence to determine the facts; you are the exclusive judges of the credibility of the witnesses, and it is for the jury to determine what the facts are, so far as there is a controversy. When facts are alleged as a basis of a lawsuit by the plaintiff, the defendant is required to make a response by his answer. If he admits the allegations of the complaint, or fails to deny

or controvert them, those allegations do not have to be proved and are to be taken as conceded in the case.

Now, one of the essentials of the plaintiff's right of action in this case is the fact that he was injured; that is not controverted, that does not have to be proved, that is a fact in the case; another of the elements essential to his right of action is that this injury was in consequence of the defendant's negligence, negligence amounting to a breach of duty which the employer owed to him while in the service of the defendant company.

The plaintiff specifies negligence in a number of particulars. There is a controversy as to whether the defendant was negligent at all, but the plaintiff is not required, in order to make out his case, to prove that the defendant was negligent in all particulars specified. If the case is proved as to one particular specification of negligence, which is sufficient in law to create a liability, it becomes unnecessary for the court and jury to analyze all of the testimony and determine as to all of the other particulars of negligence.

Now when there is a material fact about which there is a controversy, which has been so clearly proved as to really amount to an admission and to be an uncontroverted fact in the case, the Court is not required to refer that to the jury, but may determine it as a question of law; and hence in this case, the Court has assumed to decide, as announced yesterday, that as a matter of law the defendant has been proven to have been negligent in this case. That

does not authorize you to assume that the Court has determined that this defendant is negligent in all of the particulars, or with all the enormity alleged, but sufficient to constitute a legal liability. I have no objection to making it known to you and to the parties and their attorneys, that the negligence which appears so clear in this case as to justify the Court in making this ruling, is practically confessed by the manner of the defense. The defense in part has proceeded upon the theory that the officers and superintendents of this mine did not know that there was danger at that particular time in the face of the tunnel, knowledge which should have been known, or the defendant should have possessed if there had been that degree of care in inspection and competency of supervision which was required in operating a mine, which is necessarily dangerous. That, in connection with the undisputed testimony in the case, I think justifies the Court, and therefore the Court assumed the responsibility of deciding that this defendant has been proved to have been negligent by reason of neglect to supervise the work of the employees and to constantly inspect the mines, so as to know as often as the shifts were changed the conditions there, and the degree of danger to which the men going into a place of that kind were exposing themselves in going there.

Now, that is as far as the Court has gone, and it is not necessary for you to go beyond that and determine all of these questions, whether in a mine of this character, a mine of that size, it was a fault on the

part of the defendant company not to organize a force classified so as to have muckers and timbermen and miners working according to the established methods of carrying on operations in larger mines. That questions you do not need to spend the time to decide. Various other grounds of negligence are alleged; it is not necessary for us to decide whether it was negligence not to support the roof and the walls of this tunnel, cut, as the testimony tends to prove it was, through rock or solid formation.

Now, in your province of deciding whether the plaintiff shall have a verdict or not, the ruling of the Court has simplified the case so that it can be taken up by the jury and decided according to your determination of two principal questions. The first, and most important, question is whether the evidence proves affirmatively that the plaintiff was himself guilty of contributory negligence. By negligence is meant neglect to observe the degree of care and prudence for his own safety which it was his duty to observe in that employment; by contributory negligence is meant negligence which was a contributing cause of the injury, without which the injury would not have happened. If you determine that the plaintiff was guilty of contributory negligence, then, notwithstanding the defendant's negligence, the plaintiff has no legal right of action. There is no liability on the part of the employer to render compensation to him for an injury which would not have happened if he himself had exercised that degree of care for his own safety which it was his duty to exercise.

Now, a man engaged in a dangerous employment is required to be alert for his own safety; he cannot be forgetful or absent-minded and hold his employer liable for the consequences of his forgetfulness or his absent-mindedness. He has to be alert, and he is chargeable with knowledge of all that is visible and obvious to him, whatever can be seen or knowledge that may be acquired by being alert to hear and see, is to be imputed to him as knowledge which he had, because it is his duty to use his senses, and he must act in the light of the knowledge which he should have, if he is careful and prudent and vigilant.

This case is referred to the jury to determine the question of fact whether the plaintiff in entering the tunnel and proceeding to the point of danger under the rock which fell upon him proceeded to that place with the degree of caution which experienced coal miners usually and habitually observe under like conditions. There is testimony tending to prove that it is the habit and custom of experienced miners in going into a place of that kind, where there is danger of loosened rock or material overhead which may come down and injure them and crush them, and where the exposed condition is not visible to the eye, on account of the darkness there or any concealment there may be, to prospect away ahead of them by using a tool to tap the roof and ascertain the condition ahead of them before they place themselves under the point of danger. Now, if you believe that that testimony is true, that it is the rule of miners to test the safety of the roof of a mine which they are entering

in that manner, and that it is a reasonable rule, that it is negligence not to observe it, then your verdict should be for the defendant in this sace, because it is an admitted fact in the case that the plaintiff did not proceed in that manner in entering the mine and proceeding to the face of the tunnel where he was when the rock fell upon him.

The other principal question in the case is whether the injury resulted from a danger or risk which the plaintiff assumed by engaging in that employment.

It is a rule of law that all persons assume the risk of being injured from dangers that are necessarily incident to the kind of employment in which they engage; such dangers as cannot be safeguarded against by the exercise of ordinary care and prudence—I should not say ordinary, but that degree of care and prudence which the nature of the employment and the exigencies of the circumstances require of a prudent employer. An employee has a right to assume that the employer will not be negligent, that the employer will provide the means of safety which care and prudence suggest and which can be supplied to avoid unnecessary dangers; the employee assumes not only those dangers which are necessarily incident to the employment and which are latent and which come as unexpected accidents, but also he assumes the risk of being injured by causes which are known to him to exist, and also the risk of being injured by causes which would be known to him if he used his senses; that is, those causes which do exist which are obvious to a man who is careful to look and

observe and is alert for his own safety—all of those risks are included in the contract of employment as belonging on the side of the employee, risks which he assumes and for which the employer is not held liable.

You will determine from a consideration of the facts in this case whether—that is, if you have to go to this question, you do not necessarily have to consider this question if you decide that the plaintiff was guilty of contributory negligence, but if you do not so find you will have to consider this question, also, of whether the injury happened as a consequence of an exp*p*sure to danger, the risk of which he assumed.

"Now, if you consider this question it will be for you to determine from the testimony what the facts are, how much knowledge the plaintiff had in regard to the condition of the mine, and what specially dangerous conditions existed which were obvious, how much knowledge he should have had if he had exercised the care and prudence of an ordinarily intelligent miner; and then whether this accident happened from a cause which was unknown to him and which was the result of the defendant's negligence, which was not a necessary hazard of the employment.

"These two grounds of defense, the plaintiff's contributory *b*egligence and his assumption of risks, are affirmative defenses relied upon by the defendant and must be duly established in favor of the defendant by at least a fair preponderance of the evidence, or else your verdict must be for the plaintiff. I do not mean they both have to be established, but either one or the other must be established by at least a fair

preponderance of the evidence, or else your verdict must be for the plaintiff.

"In *termining* these questions, in determining whether there is a preponderance of the evidence in favor of the defendant or not, the jury should consider the evidence in its entirety, and every part of it, not only the evidence introduced by the defendant, but all the facts proved by the testimony of the plaintiff, in order to determine whether there is a preponderance of the evidence in favor of the defendant.

"A preponderance of the evidence means a greater weight of evidence, more convincing power in the evidence on that side than on the opposite side. It does not necessarily mean testimony of a larger number of witnesses or greater bulk of evidence, but evidence which has a greater convincing power. If when you have weighed the evidence you find that it balances evenly, that there is as much ground to hold one way as to hold the other, then there is not a preponderance of the evidence, and in that case you must find against the party having the affirmative of the issue, which is the defendant in this case.

"If either one of these questions which I have defined is decided by the jury in favor of the defendant, your verdict will be in favor of the defendant; if you determine both questions adversely to the defendant, your verdict will be for the plaintiff for such an amount of damages as, in the judgment of the jury, will constitute fair and reasonable compensation to him for what he has suffered, considering the same to be compensated for and the physical injury and dis-

ability, the loss of earning capacity, the impairment of the man's physical condition as affecting his ability to work and to enjoy life, and making a reasonable allowance for the amount of the pecuniary loss to him, in wages and in expenses incurred necessarily by this injury, as shown by the evidence.

"I submit to you two forms of verdict. After you have determined the case you will have your foreman sign the one that is in accordance with your decision. If it is a verdict for the plaintiff you will specify the amount of money that you award as damages. It requires the unanimous concurrence of the twelve jurors to find a verdict one way or the other."

[Defendant's Exceptions to Certain Parts of the Instructions of the Court to Jury.]

Thereupon the defendant, in open court, and before the jury had rendered a verdict, excepted to all that part of the Court's charge which is as follows:

"Now, when there is a material fact about which there is a controversy, which has been so clearly proved as to really amount to an admission and to be an uncontroverted fact in the case, the Court is not required to refer that to the jury, but may determine it as a question of law; and hence, in this case, the Court has assumed to decide, as announced yesterday, that as a matter of law the defendant has been proven to be negligent in this case. That does not authorize you to assume that the Court has determined that this defendant is negligent in all of the particulars, or with all the enormity alleged, but sufficient to constitute a legal liability. I have

no objection to making it known to you and to the parties and their attorneys, that the negligence which appears so clear in this case as to justify the Court in making this ruling, is practically confessed by the manner of the defense. The defense in part, has proceeded upon the theory that the officers and superintendents of this mine did not know that there was danger at that particular time in the face of the tunnel, knowledge which should have been known, or the defendant should have possessed if there had been that degree of care in inspection and competency in supervision which was required in operating a mine, which is necessarily dangerous. That, in connection with the undisputed testimony in the case, I think justifies the Court, and, therefore, the Court assumes the responsibility of deciding that this defendant has been proved to have been negligent by reason of neglect to supervise the work of the employees and to constantly inspect the mines, so as to know as often as the shifts were changed the condition there, and the degree of danger to which the men going into a place of that kind were exposing themselves in going there."

Defendant's reason for objecting to this charge being that the Court is not warranted by the evidence in withdrawing from the jury the issue of defendant's negligence, and should have submitted to the jury that issue by appropriate instructions; and further because it is immaterial what knowledge the defendant had or would have had, if it had inspected the mine, in that a mere inspection, without taking means to remedy the defects or dangers

thus disclosed would not have prevented injury to plaintiff. If the defendant was negligent at all, it could only be by not having remedied the dangerous conditions which an inspection would have disclosed according to plaintiff's theory, and the question of negligence in failing so to do was one about which there was a conflict of evidence and should have been submitted to the jury under appropriate instructions.

Thereupon said exception to the charge was allowed.

[Recital Relative to Verdict, etc.]

Thereupon the jury, having received the charge of the Court as aforesaid and retired to consider their verdict, after a short absence returned into court with a verdict in favor of the plaintiff for damages in the sum of $12,000, on the 2d day of April, 1908.

[Presentation of Bill of Exceptions, etc.]

Now, in the furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exception in this cause, and prays that the same may be settled, allowed, signed and certified by the Judge, as provided by law; and that the Court does hereby sign, seal and allow the same.

WOOTEN and DOWD,
Attys. for Plaintiff.

SHEPARD & FLETT,
BLATTNER & CHESTER,
L. B. daPONTI,
Attorneys for the Defendant.

[Order Settling, etc., Bill of Exceptions.]

In the United States Circuit Court, for the Western District of Washington, Sitting in Seattle.

No. 1525.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE CO.,

Defendant.

This cause having been brought on regularly before the Court on this 2d day of July, 1908, on the application of the defendant for the settling and certifying of his proposed bill of exceptions lately filed herein, and the time for settling and certifying of said bill of exceptions *h* having been duly extended by order of the Court, and by stipulation of the parties to and including this day, and the parties having agreed together with respect to the aforesaid bill of exception as the same is now presented to me, and the plaintiff's amendments so far as insisted upon by the plaintiff having been embodied in the said proposed bill of exceptions as originally filed by amendment thereof on the files with the consent of the parties and the Court, now, therefore, on motion of L. B. da Ponte and W. H. Flett, defendant's attorneys,—

It is ordered that the said proposed bill of exceptions heretofore filed in this cause as the same is now signed and amended as aforesaid, be and the same is

hereby settled as the true bill of exceptions in this cause, and that the same, as so settled, be now and here certified accordingly by the undersigned Judge of this court, who presided at the trial of this cause, and that said bill of exceptions when so certified be filed by the clerk.

C. H. HANFORD,
Judge.

[Endorsed]: Bill of Exceptions and Order Settling. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 2, 1908. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

In the Circuit Court of the United States, for the Western District of Washington, at Seattle.

No. 1525—AT LAW.

PATRICK J. SHIELDS,
Plaintiff,

vs.

TREMONT COAL & COKE CO.,
Defendant.

Petition for Writ of Error.

The defendant, Tremont Coal & Coke Company, feeling itself aggrieved by the verdict of the jury and judgment entered in this cause on the 16th day of April, 1908, comes now by Blattner & Chester, Shepard & Flett and L. B. daPonte, its attorneys, and petitions this Court for an order allowing it to prosecute a writ of error to the Honorable United States

Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be *order be* made fixing the amount of security which the defendant shall give and furnish upon said writ of error, conditioned as required by law as in cases where no supersedeas or stay of execution is requested.

Respectfully submitted,
BLATTNER & CHESTER,
SHEPARD & FLETT,
L. B. daPONTE,
Attorneys for Defendant, Tremont Coal & C. Co.

In the Circuit Court of the United States, for the Western District of Washington, at Seattle.

No. 1525—AT LAW.

PATRICK J. SHIELDS,
Plaintiff,

vs.

TREMONT COAL & COKE CO.,
Defendant.

Order Allowing Writ of Error.

Upon motion of L. B. daPonte, attorney for the above-named defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment

heretofore entered herein, and that the amount of bond on said writ of error is hereby fixed at $1,000.00.

Witness the signature of the Hon. C. H. HANFORD, Judge of the above-named court hereto annexed at the May Term of said court, and on, to wit, the 16th day of July, 1908, in the city of Seattle, State of Washington, within said Western District.

C. H. HANFORD,
Judge.

[Endorsed]: Application for Writ of Error and Order Allowing. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 16, 1908. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

In the Circuit Court of the United States, for the Western District of Washington, at Seattle.

PATRICK J. SHIELDS,
Plaintiff,

vs.

TREMONT COAL & COKE CO.,
Defendant.

Bond [on Writ of Error].

Whereas, in the above-numbered and entitled cause the defendant, Tremont Coal & Coke Company, has applied to the Hon. C. H. HANFORD, Judge of the above-named court, for the allowance of a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit; and

Whereas, said Court has fixed the security which the defendant shall give and furnish in the sum of $1,000.00:

Now, therefore, the Tremont Coal & Coke Company, as principal, and the other subscribers hereto, as sureties, acknowledge ourselves held and firmly bound unto the plaintiff, Patrick J. Shields, in the sum of $1,000.00.

Conditioned that the Tremont Coal & Coke Co., appellant, shall prosecute its writ of error to effect, and if it fail to make its plea good, shall answer all costs.

In testimony whereof, witness the names of the parties hereto affixed by their duly authorized officers, this the 16th day of July, 1908.

[Seal] TREMONT COAL & COKE CO.,
Principal.
By BLATTNER & CHESTER,
Attys.

[Seal] NATIONAL SURETY COMPANY,
By G. C. KAUFFMAN,
By W. H. OPIE,
Sureties.

Approved July 16, 1908.
C. H. HANFORD,
Judge.

[Endorsed]: Bond. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 16, 1908. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

In the United States Circuit Court, for the Western District of Washington, at Seattle.

No. 1525—AT LAW.

PATRICK J. SHIELDS,

Plaintiff,

vs.

TREMONT COAL & COKE CO.,

Defendant.

Assignment of Errors.

Comes now the defendant, Tremont Coal & Coke Company, and files the following assignment of errors upon which it will rely upon its prosecution of its writ of error in the above-numbered and entitled cause.

I.

The Honorable Circuit Court erred in refusing to grant defendant's motion for a directed verdict and judgment of dismissal made at the conclusion of the plaintiff's testimony, and which is as follows:

"First: That the testimony in the case fails to show a cause of action or establish a cause of action against the defendant."

"Second: That it appears from the testimony that the dangers and risks as a result of which plaintiff was injured were such as were necessarily assumed by plaintiff as an incident to his employment.

"Third: That it appears that the plaintiff was a man of large experience and fully appreciated and

understood the dangers of his employment, and in doing the work he was engaged in at the particular time the injury occurred, his own acts contributed to the injury.

"Fourth: That the plaintiff at the time of his injury was engaged in the work of making a dangerous place safe, and for this additional reason he assumed all the risks of his employment.

"Fifth: That the immediate cause of plaintiff's injury was the negligence of a fellow servant working with him at the time."

All of which will more fully appear from defendant's bill of exceptions.

II.

Said Court erred in overruling the first ground of defendant's motion for a directed verdict made at the conclusion of all of the evidence, and which is as follows:

"1. The plaintiff was a man of wide experience in coal mining. The dangerous condition of the roof of the tunnel at the point where and the time when the plaintiff was injured was obvious and apparent. Being obvious, plaintiff (a) assumed the risk of such danger; (b) was guilty of contributory negligence in remaining in a position where the falling rock would strike him."

III.

Said Court erred in overruling the second ground of said motion, which is as follows:

"2. One of plaintiff's duties while working as a rock miner in the tunnel in question was to examine

the tunnel carefully at the time he started each shift in which he worked to see if the blasts of the next preceding shift had loosened any rock in the roof or elsewhere, so that it became dangerous, and upon finding any such rock to remove it, or otherwise make all such unsafe places safe, and in performing such duty he assumed the risks connected therewith."

IV.

Said Court erred in overruling the third ground of said motion, which is as follows:

"3. The testimony shows that the defendant had no notice of the condition of the tunnel at the time of the accident, and also that the condition had been changed previous thereto, rendering the roof of the tunnel at that point dangerous and unsafe. The defendant cannot *ne* charged with negligence in regard to that *c*ndition, while the plaintiff, seeing and appreciating the entire situation, is charged with knowledge of such condition."

V.

Said Court erred in overruling the fourth ground of said motion, which is as follows:

"4. The character and formation of the rock in the tunnel in question was such that it was not required to render it so that timbers should be used, and the statutory requirement in regard to furnishing timbers where required has no application so that the question of the assumption of the risk is unaffected by such statute."

VI.

Said Court erred in overruling the fifth ground of said motion, which is as follows:

"5. There was plenty of opportunity for plaintiff, upon seeing the dangerous and unsafe roof at the point where he was injured, to have kept himself from under the loose rock and have been perfectly safe while engaged in the work of testing its condition, and doing whatever was necessary to make it safe. Notwithstanding this, the plaintiff remained in a position under such loose and dangerous rock, and was injured in its fall. His selection of a dangerous position when a safe place was open to him was voluntary and constitutes negligence which defeats recovery. His selection of a dangerous method in which to investigate such dangerous roof when a safe method was open to him also constitutes negligence which defeats recovery."

VII.

The said Court erred in overruling the sixth and last ground of said motion, which is as follows:

"And on the further ground that the injury to the plaintiff in this case was the direct and proximate result of the negligence of a fellow-servant."

All of the above and foregoing will fully appear by reference to defendant's bill of exceptions.

VIII.

The verdict of the jury is contrary to the law and the undisputed evidence, in that it appears from the undisputed proof, and from plaintiff's own testimony, that it was his own duty to inspect the roof, and that the condition thereof, and the dangers incident to such condition were better known to plaintiff than to defendant, and he assumed the risk of

injury therefrom, and the lower Court therefore erred in rendering judgment against defendant.

IX.

The said Court erred in charging the jury that defendant was guilty of negligence as a matter of law, which charge is as follows:

"Now, when there is a material fact about which there is a controversy, which has been so clearly proved as to really amount to an admission, and to be an uncontroverted fact in the case, the Court is not required to refer that to the jury, but may determine it as a question of law; and hence, in this case, the Court has assumed to decide, as announced yesterday, that as a matter of law the defendant has been proven to be negligent in this case. That does not authorize you to assume that the Court has determined that this defendant is negligent in all of the particulars, or with all the enormity alleged, but sufficient to constitute a legal liability. I have no objection to making it known to you and to the parties and their attorneys that the negligence which appears so clear in this case as to justify the Court in making this ruling is practically confessed by the manner of the defense. The defense in part has proceeded upon the theory that the officers and superintendents of this mine did not know that there was danger at that particular time in the fact of the tunnel, knowledge which should have been known, or the defendant should have possessed if there had been that degree of care in inspection and competency of supervision which was required in operating

a mine, which is necessarily dangerous. That, in connection with the undisputed testimony in this case, I think justifies the Court, and, therefore, the Court assumed the responsibility of deciding that this defendant has been proved to have been negligent by reason of neglect to supervise the work of the employees, and to constantly inspect the mine so as to know as often as the shifts were changed the condition there, and the degree of danger to which the men going into a place of that kind were exposing themselves in going there."

All of which will fully appear by reference to defendant's bill of exceptions.

X.

The Court erred in refusing to give to the jury the first special instruction requested by defendant, which is as follows:

"I instruct you that ordinarily the defendant is bound to use reasonable care in furnishing a reasonably safe place for the servant in which to work, but that where, in the exigencies and progress of the work, the condition is constantly changing it is not incumbent upon the defendant that the safety shall be continuous at every moment of the time, and where such place becomes unsafe and the plaintiff, in the exercise of his duty, undertakes to make it safe, then I charge you that he assumes all the risks incident to such undertaking, and if he is injured while engaged in such undertaking, he cannot recover."

XI.

The said Court erred in refusing to give to the

jury the second special instruction requested by defendant, which is as follows:

"I further instruct you that if you find from the evidence that the plaintiff, upon discovering the condition of the tunnel at the point where he was injured just prior to such injury, knew, or ought in the exercise of ordinary care, to have known that the roof at such point was in a dangerous or unsafe condition, then I charge you that it was negligence for plaintiff to remain under such unsafe and dangerous roof, as he did, so that when it fell it struck him and caused the injury complained of, and such negligence directly contributed to the injury received and plaintiff cannot recover in this action."

XII.

Said Court erred in refusing to give to the jury the fifth special instruction requested by defendant, which is as follows:

"You are instructed that the testimony in this case shows that the plaintiff was a man of wide experience in the work of mining, and is, therefore, necessarily charged with knowledge of the ordinary risks and dangers incident to the business. If you believe from the evidence that the plaintiff could have made a careful inspection of the condition of the roof of the tunnel at the place where he was injured without placing himself in a position of danger, and that he voluntarily went to the face of the tunnel, hung his lamp upon a rock and then stepped back to examine the roof, and after having done so decided to go across the tunnel for any purpose whatsoever, and by reason of having gone into that position of danger

was injured, I charge you that such action on his part constituted negligence which contributed directly to the injury, and your verdict must be for the defendant."

All of which fully appears from defendant's bill of exceptions.

XIII.

The Court erred in overruling defendant's motion for a new trial.

Wherefore defendant, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington be reversed, and that such directions be given that full force and efficacy may enure to defendant by reason of its defense to this cause.

BLATTNER & CHESTER,
SHEPARD & FLETT,
L. B. da PONTE,
Attorneys for Defendant (Plaintiff in Error), Tremont Coal & Coke Co.

[Endorsed]: Assignment of Errors. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 16, 1908. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

In the Circuit Court of the United States for the Western District of Washington, at Seattle.

No. 1525—AT LAW.

TREMONT COAL & COKE CO.,

Plaintiff in Error,

vs.

PATRICK J. SHIELDS,

Defendant in Error.

Writ of Error [Copy].

The President of the United States, to the Honorable, the Judge of the Circuit Court of the United States, for the Western District of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment upon a plea which is in the said circuit court before you, or some of you, between the Tremont Coal & Coke Company, plaintiff in error, and Patrick J. Shields, defendant in error, manifest error hath happened, to the great damage of the said Tremont Coal & Coke Company, plaintiff in error, as by their complaint and assignment of error appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 15th day of August, next, and within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 16th day of July, 1908.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court for the Western District of Washington.

By R. M. Hopkins,
Deputy.

C. H. HANFORD,
Judge of said Court.

Service of the within writ of error and receipt of a true copy thereof is hereby admitted this 16th day of July, 1908.

DUDLEY G. WOOTEN,
WOOTEN & DOWD,
Attorneys for Defendant in Error.

[Endorsed]: Writ of Error. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jul. 20, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the United States Circuit Court for the Western District of Washington, at Seattle.

No. 1525—AT LAW.

TREMONT COAL & COKE COMPANY,
Plaintiff in Error,

vs.

PATRICK J. SHIELDS,
Defendant in Error.

Citation in Error [Copy].

United States of America.

The President of the United States to Patrick J. Shields and Dudley G. Wooten, His Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to a writ of error filed in the office of the Clerk of the Circuit Court of the United States for the Western District of the State of Washington, sitting at Seattle, wherein you are plaintiff and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the

United States of America, this 16th day of July, 1908.

C. H. HANFORD,
Judge of said Court.

[Seal] A. REEVES AYRES,
Clerk U. S. C. C. W. Dist. Wash.
By R. M. Hopkins,
Deputy.

Service of the foregoing citation in error is hereby accepted and further service thereof is hereby waived by defendant in error.

DUDLEY G. WOOTEN,
WOOTEN & DOWD,
Attorneys for Defendant in Error.

July 16, 1908.

[Endorsed]: Citation in Error. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 20, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1525.

TREMONT COAL & COKE CO.,
Plaintiff in Error,

vs.

PATRICK J. SHIELDS,
Defendant in Error.

Praecipe for Transcript.

Clerk U. S. Circuit Court:

You will please prepare transcript of record in No. 1525, on the law docket, Patrick Shields vs. Tremont Coal & Coke Company, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, 9th Circuit, under the writ of error heretofore perfected to said Court, and include in said transcript the following papers on file:

1. Summons and complaint.
2. Answer.
3. Reply.
4. Motion for directed verdict.
5. Verdict.
6. Judgment.
7. Motion for new trial.
8. Opinion overruling motion for new trial.
9. Order overruling motion for new trial.
10. Bill of Exceptions.
11. Petition for writ of error.
12. Order allowing writ of error.
13. Error bond.
14. Assignment of errors.
15. Writ of error.
16. Citation in error.
17. Praecipe for transcript.

BLATTNER & CHESTER,
By L. B. da PONTI.

[Endorsed]: Praecipe for Transcript. Filed in the U. S. Circuit Court, Western Dist. of Washing-

ton. Aug. 1, 1908. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1525.

PATRICK J. SHIELDS,
Plaintiff and Defendant in Error,

vs.

TREMONT COAL & COKE COMPANY (a Private Corporation),
Defendant and Plaintiff in Error.

Clerk's Certificate [to Transcript of Record].

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the Western District of Washington, do hereby certify the foregoing one hundred eight (108) typewritten pages, numbered from 1 to 108, inclusive, to be a full, true and correct copy of the record and proceedings in the above entitled cause as is called for by the praecipe of the Attorneys for the Defendant and Plaintiff in Error, as the same remain of record and on file in the office of the Clerk of the said Court,—as I am required to certify and transmit as the record on appeal from the Circuit Court of the United States for the Western District of Washington, and as the return to the

annexed Writ of Error, to the Circuit Court of Appeals for the Ninth Judicial Circuit; and that the foregoing record constitutes the Record on Appeal and Return to said annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the Original Citation and Writ of Error.

I further certify that the cost of preparing and certifying the foregoing record on appeal and return to Writ of Error is the sum of $91.60, and that the said sum has been paid to me by Shepard and Flett, and Blattner and Chester and L. B. da Ponti, Attorneys for Defendant and Plaintiff in Error.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 11th day of August, 1908.

[Seal] A. REEVES AYRES,
Clerk.
By R. M. Hopkins,
Deputy Clerk.

In the Circuit Court of the United States for the Western District of Washington, at Seattle.

No. 1525—AT LAW.

TREMONT COAL & COKE CO.,
Plaintiff in Error,

vs.

PATRICK J. SHIELDS,
Defendant in Error.

Writ of Error [Original].

The President of the United States, to the Honorable, the Judge of the Circuit Court of the United States, for the Western District of Washington, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment upon a plea which is in the said Circuit Court before you, or some of you, between the Tremont Coal & Coke Company, plaintiff in error, and Patrick J. Shields, defendant in error, manifest error hath happened, to the great damage of the said Tremont Coal & Coke Company, plaintiff in error, as by their complaint and assignment of errors appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 15 day of August, next, and within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error,

what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 16th day of July, 1908.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court for the Western District of Washington.

By R. M. Hopkins,
Deputy.

C. H. HANFORD,
Judge of said Court.

Service of the within writ of error and receipt of a true copy thereof is hereby admitted this 16 day of July, 1908.

DUDLEY G. WOOTEN,
WOOTEN & DOWD,
Attorneys for Defendant in Error.

[Endorsed]: No. 1525. In the Circuit Court of the United States for the Western District of Washington, at Seattle. Tremont Coal & Coke Co., Plaintiff in Error, vs. Patrick J. Shields, Defendant in Error. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 20, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the United States Circuit Court for the Western District of Washington, at Seattle.

No. 1525—AT LAW.

TREMONT COAL & COKE COMPANY,
Plaintiff in Error,

vs.

PATRICK J. SHIELDS,
Defendant in Error.

Citation in Error [Original].

United States of America.

The President of the United States to Patrick J. Shields and Dudley G. Wooten, His Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the office of the clerk of the Circuit Court of the United States for the Western District of the State of Washington, Western Division, sitting at Seattle, wherein you are plaintiff and defendant in error, and the Tremont Coal & Coke Co. is defendant and plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 16th day of July, 1908.

C. H. HANFORD,
Judge of said Court.

[Seal] A. REEVES AYRES,
Clerk U. S. C. C. W. Dist. Wash.
By R. M. Hopkins,
Deputy.

Service of the foregoing citation in error is hereby accepted and further service thereof is hereby waived by defendant in error.

July 16, 1908.

DUDLEY G. WOOTEN,
WOOTEN & DOWD,
Attorneys for Defendant in Error.

[Endorsed]: No. 1525. In the *United Circuit* Court for the Western District of Washington. Tremont Coal & Coke Co., Plaintiff in Error, vs. Patrick J. Shields, Defendant in Error. Citation in Error. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jul. 20, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

[Endorsed]: No. 1639. United States Circuit Court of Appeals for the Ninth Circuit. The Tremont Coal & Coke Company (a Private Corporation), Plaintiff in Error, vs. Patrick J. Shields, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Filed August 24, 1908.

F. D. MONCKTON,
Clerk.

IN THE UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE TREMONT COAL & COKE COMPANY,
Plaintiff in Error,
vs.
PATRICK J. SHIELDS,
Defendant in Error.

No. 1639

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF FOR PLAINTIFF IN ERROR

BLATTNER & CHESTER,
SHEPARD & FLETT,
L. B. DA PONTE,
Attorneys for Plaintiff in Error.

South Tacoma Press Print

IN THE UNITED STATES

CIRCUIT COURT OF APPEALS

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UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF FOR PLAINTIFF IN ERROR

BLATTNER & CHESTER,
SHEPARD & FLETT,
L. B. DA PONTE,
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

This suit was commenced by defendant in error May 1st, 1907 for the purpose of recovering damages for personal injuries sustained while in the employ of plaintiff in error as a miner in Pierce County, Washington, on the 27th day of July, 1906. The case was tried by jury and resulted in a verdict and judgment in favor of defendant in error in the sum of $12,000.00, from which this writ of error is prosecuted.

The complaint alleges that defendant in error was employed as a hard rock or quartz miner in plaintiff in error's mine in Wilkeson, Pierce County, Washington, and at the time of the accident was engaged in tunnelling a drift or cross cut six by eight feet from the lower level of the mine through the earth to a vein of coal several hundred feet away. The tunnel was being driven by blasting with high explosives and the men worked in shifts of eight hours each, two men to a shift, plaintiff's shift being from 11 p. m. to 7 a. m. It was the duty of the various shifts to drill holes in the face of the tunnel from the time of going in until nearly time to come out when they would fill the holes with explosives, light the fuse and hasten out of the mine. As soon as the smoke and fumes of the explosion had disappeared the next shift would go in and repeat the operation. It is alleged

that on July 27th, 1906 defendant in error went to work on his regular shift in the tunnel at about 11 o'clock p. m., and that since his last shift, which had ended at 7 o'clock a. m. the same day, considerable work had been done in the drift and fresh rock had been exposed in the roof overhead, of which he had no knowledge, and which made the place of work extremely dangerous, and that the rock so blasted down by the preceding shifts had been allowed to accumulate on the floor of the drift, rendering it difficult to move about and impossible to escape in the event of a cave in. That said freshly exposed portion of the roof was not supported by any timbers, as it should have been to make it safe. That within a few minutes after defendant in error went on duty, and before he had time to discover the danger of the place, a heavy rock in the freshly exposed portion of the roof near the face of the drift suddenly fell on him, carrying with it a mass of dirt and stones, and completely crushing and burying him beneath its heavy weight, and inflicting the injuries for which a recovery is sought.

The negligence charged consisted of,

(a) Allowing the rock and dirt to accumulate on the floor of the drift.

(b) Failure to timber the roof of the drift.

(c) Careless management of the mine and failure to inspect the same so as to ascertain the conditions.

(d) Failure to comply with the rules and regulations prescribed by law "for the inspection, safeguarding, clearing, timbering and otherwise prudently conducting said mine."

(e) Failure to provide a crew of muckers for the removal of the loose dirt and rock blasted from the face of the drift.

(f) Failure to provide a crew of timbermen to timber the roof of the drift at the point of the accident.

(g) And generally, in failing to provide a safe place for plaintiff's work. Rec. p. 4 *et seq.*

The answer of plaintiff in error denied the charges of negligence and pleaded assumed risk and contributory negligence in bar of the action.

The court charged the jury that defendant had been proven negligent as a matter of law "by reason of neglect to supervise the work of the employees and to constantly inspect the mine so as to know as often as the shifts were changed the conditions there, and the degree of danger to which the men going into a place of that kind were exposing themselves in going there," and further charged that the jury need not determine whether or not the defendant was negligent in any of the other respects alleged. The only issues submitted were the affirmative defenses of assumed risk and contributory negligence pleaded by plaintiff in error. Rec. p. 77.

The principal errors assigned relate to the giving of the above charge, to the refusal of the court to grant the motion for a directed verdict on the ground that plaintiff assumed the risk of the injury he received, that he was guilty of contributory negligence as a matter of law for having unnecessarily exposed himself to a known

danger, and in refusing to give certain requested instructions.

ASSIGNMENT OF ERRORS.

Comes, now, the defendant, Tremont Coal & Coke Company, and files the following assignment of errors upon which it will rely upon its prosecution of its writ of error in the above-numbered and entitled cause.

I.

The Honorable Circuit Court erred in refusing to grant defendant's motion for a directed verdict and judgment of dismissal made at the conclusion of the plaintiff's testimony, and which is as follows:

"First: That the testimony in the case fails to show a cause of action or establish a cause of action against the defendant."

"Second: That it appears from the testimony that the dangers and risks as a result of which plaintiff was injured were such as were necessarily assumed by plaintiff as an incident to his employment.

"Third: That it appears that the plaintiff was a man of large experience and fully appreciated and understood the dangers of his employment, and in doing the work he was engaged in at the particular time the injury occurred. his own acts contributed to the injury.

"Fourth: That the plaintiff at the time of his in-

jury was engaged in the work of making a dangerous place safe, and for this additional reason he assumed all the risks of his employment.

"Fifth: That the immediate cause of plaintiff's injury was the negligence of a fellow servant working with him at the time."

All of which will more fully appear from defendant's bill of exceptions.

II.

Said Court erred in overruling the first ground of defendant's motion for a directed verdict made at the conclusion of all of the evidence, and which is as follows:

"1. The plaintiff was a man of wide experience in coal mining. The dangerous condition of the roof of the tunnel at the point where and the time when the plaintiff was injured was obvious and apparent. Being obvious, plaintiff (a) assumed the risk of such danger; (b) was guilty of contributory negligence in remaining in a position where the falling rock would strike him."

III.

Said Court erred in overruling the second ground of said motion, which is as follows:

"2. One of plaintiff's duties while working as a rock miner in the tunnel in question was to examine the tunnel carefully at the time he started each shift in which he worked to see if the blasts of the next preceding shift

had loosened any rock in the roof or elsewhere, so that it became dangerous, and upon finding any such rock to remove it, or otherwise make all such unsafe places safe, and in performing such duty he assumed the risks connected therewith."

IV.

Said Court erred in overruling the third ground of said motion, which is as follows:

"3. The testimony shows that the defendant had no notice of the condition of the tunnel at the time of the accident, and also that the condition had been changed previous thereto, rendering the roof of the tunnel at that point dangerous and unsafe. The defendant cannot be charged with negligence in, regard to that condition, while the plaintiff, seeing and appreciating the entire situation, is charged with knowledge of such condition."

V.

Said Court erred in overruling the fourth ground of said motion, which is as follows:

"4. The character and formation of the rock in the tunnel in question was such that it was not required to render it so that timbers should be used, and the statutory requirement in regard to furnishing timbers where required has no application so that the question of the assumption of the risk is unaffected by such statute."

VI.

Said Court erred in overruling the fifth ground of

said motion, which is as follows:

"5. There was plenty of opportunity for plaintiff, upon seeing the dangerous and unsafe roof at the point where he was injured, to have kept himself from under the loose rock and have been perfectly safe while engaged in the work of testing its condition, and doing whatever was necessary to make it safe. Notwithstanding this, the plaintiff remained in a position under such loose and dangerous rock, and was injured in its fall. His selection of a dangerous position when a safe place was open to him was voluntary and constitutes negligence which defeats recovery. His selection of a dangerous method in which to investigate such dangerous roof when a safe method was open to him also constitutes negligence which defeats recovery."

VII.

The said Court erred in overruling the sixth and last ground of said motion, which is as follows:

"And on the further ground that the injury to the plaintiff in this case was the direct and proximate result of the negligence of a fellow-servant."

All of the above and foregoing will fully appear by reference to defendant's bill of exceptions.

VIII.

The verdict of the jury is contrary to the law and the undisputed evidence, in that it appears from the undisputed proof, and from plaintiff's own testimony, that it was his own duty to inspect the roof, and that the

condition thereof, and the dangers incident to such condition were better known to plaintiff than to defendant, and he assumed the risk of injury therefrom, and the lower Court therefore erred in rendering judgment against defendant.

IX.

The said Court erred in charging the jury that defendant was guilty of negligence as a matter of law, which charge is as follows:

"Now, when there is a material fact about which there is a controversy, which has been so clearly proved as to really amount to an admission, and to be an uncontroverted fact in the case, the Court is not required to refer that to the jury, but may determine it as a question of law; and hence, in this case, the Court has assumed to decide, as announced yesterday, that as a matter of law the defendant has been proven to be negligent in this case. That does not authorize you to assume that the Court has determined that this defendant is negligent in all of the particulars, or with all the enormity alleged, but sufficient to constitute a legal liability. I have no objection to making it known to you and to the parties and their attorneys that the negligence which appears so clear in this case as to justify the Court in making this ruling is practically confessed by the manner of the defense. The defense in part has proceeded upon the theory that the officers and superintendents of this mine did not know that there was danger at that particular time in the face of the tunnel, knowledge which should

have been known, or the defendant should have possessed if there had been that degree of care in inspection and competency of supervision which was required in operating a mine, which is necessarily dangerous. That, in connection with the undisputed testimony in this case, I think justifies the Court, and, therefore, the Court assumed the responsibility of deciding that this defendant has been proved to have been negligent by reason of neglect to supervise the work of the employees, and to constantly inspect the mine so as to know as often as the shifts were changed the condition there, and the degree of danger to which the men going into a place of that kind were exposing themselves in going there."

All of which will fully appear by reference to defendant's bill of exceptions.

X.

The Court erred in refusing to give to the jury the first special instruction requested by defendant, which is as follows:

"I instruct you that ordinarily the defendant is bound to use reasonable care in furnishing a reasonably safe place for the servant in which to work, but that where, in the exigencies and progress of the work the condition is constantly changing it is not incumbent upon the defendant that the safety shall be continuous at every moment of the time, and where such place becomes unsafe and the plaintiff, in the exercise of his duty, undertakes to make it safe, then I charge you that he assumes all the risks incident to such undertaking, and if he is

injured while engaged in such undertaking, he cannot recover."

XI.

The said Court erred in refusing to give to the jury the second special instruction requested by defendant, which is as follows:

"I further instruct you that if you find from the evidence that the plaintiff, upon discovering the condition of the tunnel at the point where he was injured just prior to such injury, knew, or ought in the exercise of ordinary care, to have known that the roof at such point was in a dangerous or unsafe condition, then I charge you that it was negligence for plaintiff to remain under such unsafe and dangerous roof, as he did, so that when it fell it struck him and caused the injury complained of, and such negligence directly contributed to the injury received and plaintiff cannot recover in this action."

XII.

Said Court erred in refusing to give to the jury the fifth special instruction requested by defendant, which is as follows:

"You are instructed that the testimony in this case shows that the plaintiff was a man of wide experience in the work of mining, and is, therefore, necessarily charged with knowledge of the ordinary risks and dangers incident to the business. If you believe from the evidence that the plaintiff could have made a careful inspection of the condition of the roof of the tunnel at

the place where he was injured without placing himself in a position of danger, and that he voluntarily went to the face of the tunnel, hung his lamp upon a rock and then stepped back to examine the roof, and after having done so decided to go across the tunnel for any purpose whatsoever, and by reason of having gone into that position of danger was injured, I charge you that such action on his part constituted negligence which contributed directly to the injury, and your verdict must be for the defendant.''

All of which fully appears from defendant's bill of exceptions.

XIII.

The Court erred in overruling defendant's motion for a new trial.

Wherefore defendant, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington be reversed, and that such directions be given that full force and efficacy may enure to defendant by reason of its defense to this cause.

ASSUMED RISK.

———

We contend that *plaintiff's own testimony* shows that he assumed the risk of the injury he sustained, and further, that he was guilty of gross negligence for having unnecessarily assumed a position directly under the impending rock with full knowledge of all the condition

and the likelihood of its falling upon him, and the court, therefore, should have sustained the motion for a directed verdict.

As contributory negligence involves the element of knowledge upon plaintiff's part of the condition of the roof and the danger incident thereto, these two defenses may be considered together.

The following is the testimony of defendant in error. Rec. p. 49 to 59.

Cross-examination.

(*Testimony of Patrick Shields.*)

PATRICK SHIELDS, plaintiff, being sworn, testified as follows:

I am the plaintiff in this case; I am 43 years old. I am a miner. I commenced practical mining in 1870; had been in coal mines before that. I was in mines when I was a little boy. I have worked principally in coal mines, but have worked in quartz, gold, copper and iron mines. I have labored around mines and in and out of them, and been timberman and foreman and superintendent of mines too, part of the time. The greater part of the time I was common miner. *I am familiar with the methods and rules that obtain in mines generally in regard to the method of tunneling and timbering and the various duties and relations of employees.*. I went to work for the Tremont Coal and Coke Co. on the 9th of July at noon and labored around the top until the 18th of July, and then I went to work in the rock tunnel, where

I was injured. The duties of a miner is to break rock under orders of the shift boss or foreman, or to mine coal. I was employed as a miner to break rock in the face of the tunnel. I didn't see any timbermen there. I told the boss, John Wildiz, that we ought to have some timbers in there occasionally to take care of that ground, that rock, when it is getting loose, so as to take care of that. From the character of the roof and the rocks, especially where I was hurt in the breast of the tunnel, there should be false timbers there all the time. There ought to be a few timbers, emergency timbers, so that a loose rock or any part that is dangerous to work around you can put an emergency prop under it and it will designate which way it is to be taken down or what is to be done with it. Perhaps it is not to be taken down. I was never furnished with any timbers while I was at work there. The first shift I went on I asked my foreman, "Where are the timbers?" He said he didn't know. "We haven't been using any yet," and I looked around and said, "There are some places you certainly ought to be using some." I went to work on the shift at eleven o'clock, and had been in the mine not ten minutes before I was hurt. I could not have been there five minutes when I was caught.

(Testimony of Patrick Shields.)

"Q. What occurred there? State in your own way what happened after you came to the breast of the tunnel.

"A. The coincidence is something I will never for-

get and I remember all about it. I went up on one side of the tunnel the way miners—kind of an unwritten agreement which side of the tunnel they work on. Generally keep to the right or left. We always do that. I don't care where it is, what ground, he takes the safe side of it, no matter which side it is, and of course we take next to the pillars. The middle is always supposed to be the weaker point, and that we had no timbers or anything, naturally that place there that should have been timbered that was not timbered and we would take the advantage of being careful that way. I went up alongside and the rock that had been blasted from the shift prior to my coming on and muck was laying around there perhaps eighteen inches, say from nothing to eighteen inches in heighth of this muck going gradually up to the face or breast, and I touched some rocks going along. I could not walk straight when I came to that ground because of this. I went on and hung the light on the face of the breast and John called my attention, he says, *'This roof is looking pretty bad to-night.' I says, 'Is it? Well, then, we will have to take a look around and see what it is,' and I turned around and that light had been turning. Any man knows that when he hangs it on the face it gives a reflection and it shines on the roof, and I looked around and says, 'Yes, John, that is pretty bad looking, don't look good to me.' I says, 'I am going up for the hammer; I will go for the hammer and examine that.' It is as heavy rock or ground, it is big ground; that is what miners call it; shell ground, big crack. You can't sound* it with a pick or light instrument. You have to have something heavy, and hold one hand to it and jar it and

it is the jar that you go by, from the natural instinct of practice, and I was going after it. *He says, 'I have got the hammer here,' and I, of course, knew it was on his side and started to go over, and just as I was going a rock or slip fell down and struck me and threw me down and twisted me in this position.* Threw me down this way and slung this under and throwed my body back. I remember the position I was in; I never can get into it again. While I was down struggling I didn't know what was causing it that I could not get out because I didn't think I was hurt bad. I says, 'For Christ's sake, John, come and get me out,' and he rushed, and it was lucky that he was stunned himself, for if he hadn't been badly stunned we might have been both caught, but he got a butt in the head and was dazed and didn't get back very quick. I hollered two or three times to him before he came to me. It was all done in probably twenty seconds, and the second fall, this big rock they tell about, that big rock should never have fallen on me. If the ground had been taken care of on the last two shifts it would never have fell on me. It would have been stopped there on the timber and I would have been a well man. And that is just how the thing occurred, exactly."

The rock that I was going to test is part of the rock that fell on me, but the rest of the ground around there is kind of ticklish too. It was not that rock that knocked me down first. It was another shell of a rock adjoining it. It was not twenty seconds or half a minute between the two falls. *On my previous shift I had gone off at seven o'clock that morning and the condition of the roof at that time was not good. There was always cracks*

there. The ground lays in layers; the sand rock lays in layers, fairly good, just about the average, same way as any other. Before Gillis and I went off that morning we probably had five holes drilled. That morning the breast was hanging over pretty well, and we put in our holes to take this heavy off. Put in the corner holes deeper and kept the round up to the center. I told John, my foreman, that the rock was changing, there was streaks getting into it, black streaks. Of course, that meant a change. Had the appearance of softer and black places through those water seams and the lay of the country which was laying on about forty-five degrees. It kind of seemed to be as though it was going to strike the coal pretty soon. Rock was changing and I presumed we were going to strike that vein of coal and I remarked in the office the day before I got hurt that I believed there was going to be coal struck in that place and there was a change coming. After I got off that morning if they did good work they would be in from 22 to 24 inches further. The rock fell behind me. The place where I was struck was about four or four and a half feet from the face, perhaps five; I don't, but I was trapped right with the head towards the face of the rock. The fact that there was an accumulation of muck or rock at the breast of the tunnel had considerable effect upon my examination of the condition that existed there. The rock was shot all over and rock and chunks here and there and you had to move it out of your way. It leaves you kind of stumbling, but if it was out of the way a man could move safely, generally safer. The shifts prior to mine should have taken care of that ground by timber-

ing, or if the boss ordered them to do so, put up a glory hole and shoot it down, but in any way of looking at it it should have been taken care of by being timbered. It is the foreman's duty when he hears a complaint from miners that examine the mine to have it repaired. If that was not done right along in other mines, why mines would be a slaughter-house.

Cross-examination.

I started coal mining in 1870 and have been working in and around mines ever since. In Kansas I held the position of superintendent, or foreman, or pit-boss about four and a half years. I contracted taking out coal at Rich Hill, Missouri, for about thirteen months. In Montana I held a superior position in quartz and coal mines. I was superintendent and manager of the mines there about four years; this was in Belt, Montana. I was miner, and timberman, and foreman in Butte, Mont., in quartz mines, about fifteen months. I worked in coal mines at Gilt Edge, Mont. Opened a coal mine there for the Gilt Edge Mining Co. I have worked in mines in Illinois, Missouri, Iowa, Kansas, Utah, Montana and British Columbia. The blasts in the face of the tunnel make what we call an overbreak; that is the vibration and concussion of the shock may shake it back quite a ways. *The shots that are put in at the end of every shift necessarily change the condition of the tunnel immediately back of the face, and if they are deep shots they will make a greater change, and when a man goes back in the tunnel after one of the shifts comes off he naturally expects to find a new condition at the face, and when the*

ground begins to get bad over a man's head he ought to have it taken care of by reporting to the boss or laying off work until it is repaired or something done. He is not supposed to commit suicide. It is not always proper to take down a loose rock like this was. If I was bossing it I would see that it would not be let down. I would not be hiring muckers to have miners driving glory holes up over the work as was described to be done. That can be done, but it is not mining. Whenever a man is ordered to drive a place eight by six he is supposed to drive it that width and if you commence to make an overbreak the boss will very soon tell you about it, as he *doesn't want the* muckers to be hoisting up muck that is dropped in the mine. *If the place is dangerous the miner has no right to be there, and if he makes up his mind it is not a safe place to be he should not work under it but should notify his superior.* I did not hear Carlson tell Gillis about this rock being loose. If I had I would not be here today. If I had had Gillis' information I don't think that I would be here to-day. I was intending to take the hammer and examine the rock carefully and if I had found it in an unsafe condition to work under I would have reported to the boss or sent my partner to notify the boss that there was a big piece of ground that should be either timbered or taken down at his orders. I went to the face of the tunnel and hung my light to it and stepped back and on the side about four feet from the face of the tunnel, and just as I was going to go over towards Jack the rock hit me on the shoulder and twisted me around with my face towards the face of the tunnel. The rock fell from around the center of

the roof. It was not from the edge of the roof, because I was edging pretty close myself and it fell just as I was going over towards him in that stooping position. Gillis was on the right-hand side of the tunnel and I was on the left-hand side. *I wanted the hammer to sound the rock. That is customary, to take it and stand around in the safest place to get and reach it with the hammer and sound it; and if it sounds solid you are supposed to be safe, and then you advance from there and sound the other and keep yourself on safe ground. You pass on your own judgment. If it sounds right to you you advance further and sound the ground further on, and if you find some ground that is not safe, that you know by the sound of the hammer is not right, you take other ways to prove it. You get a long bar and reach over, and if you see a crack some place you try and pry it down. You are not going to walk under it. The condition of this rock lead me to feel that I wanted to test it. The roof didn't look good to me that night. I saw that there was a change had taken place there during my absence of sixteen hours and the other shifts working there, and there was a general change took place and I noticed it, but had not had time to take care of it or do anything with it. The change that had taken place was that the roof was getting bad generally all around, the roof and the face of the tunnel.* The formation of that country all lays pitting and pitching on an angle of forty-five degree or such a matter, and there are slips and layers in the sandstone that run all one way and when they get cracks across this way to the breaking of that ground,

we watch them. I can't tell you how wide the big rock was. I knowed that it was high. I was partly under it. *This testing of rock is something I have to do right along in rock mining. A man is always looking out for his head.* If I had orders to take that rock down I would try my bar on it and if it didn't come down and was dangerous to stand under and drill it I would put in small timber consisting of a post and cap under it, and commence to drill and as soon as you light the fuse you knock your false cap out and it comes down. I don't take down rocks without orders if I think it is a big heavy rock. It would not be doing my duty if I did so, but if I see a cave coming in that I believe is heavy and extraordinary I notify the boss that the ground is getting heavy and that I think there is a big cave coming and the boss gives instructions if he wants to take it down. If any irregularity comes in the roof through heavy ground or caving in he notifies his boss. He is instructed to take out so much ground, eight by ten or ten by twelve or whatever it may be, and is not expected or allowed to go over that if possible. The walls must be kept as uniform to the size as possible, on account of the muck. You must have it regular. If I had gotten my hammer against the rock and discovered that it was loose I would have gone out or sent my partner and notified the boss; I would have stopped right there. This roof all showed to be cracked and cross-cracked, slips going this way, angling off. They were going different ways, making the ground irregular and unsafe looking. *There were cracks on both sides of this rock, but in the center there*

were bigger cracks, more noticeable than any. I didn't have time to make a thorough examination of it.. That indicated that the rocks were loose and that there was a change since I was there before. These cracks had come in. Every time I came in on my shift I would examine the roof and know where I was going to be working. I didn't have time to examine it but I saw that a change had taken place. I was going to examine it but got caught before I did examine it. I mucked two or three cars of broken rock when Foreman John Wildiz, ordered me never to do it again, that they hired me to break rock and not to muck. If I had been mucking I would not have been under that rock. If I was mucking I would expect somebody to examine it before I went to mucking. A mucker is not bound to go and muck unless the ground is examined ahead of him, *but the miner makes his own examination and finds if the ground is bad.* The mucker works under the miner. The miner tells him where to clean the rock out, and if it is dangerous tells him to keep out and wait until it is fixed.

Thereupon the plaintiff through his attorney, Dudley G. Wooten, announced to the Court that his evidence was concluded and rested his case.

The testimony of John Gillis, plaintiff's shift partner, and the only eye witness to the accident, corroborates the testimony of plaintiff. Rec. p. 43-49.

Plaintiff's witness, R. B. Hamilton, who worked in the tunnel from 7 o'clock a. m. until 3 p. m. of the day of the accident, testified that the condition of the roof was

bad when he went off, "Q. Mr. Hamilton, what was the condition of the roof when you left? A. I considered it bad. Q. In what respect? A. Danger of caving. Q. Well, what was the character of the danger as to being immediate? A, Well, I considered it dangerous right at the present time. Q. Did you make any investigation in reference to it? A. I looked at it and tried to pry a chunk down that I was afraid of. Q. Well what was it particularly that you thought was dangerous? A. Well I was more afraid of a large stone that there was slips around that looked to me like it cut it off and I was afraid it would fall down." Rec. p. 32-33. The witness afterwards saw this rock on the floor of the drift. Rec. p. 36.

This was before the witness fired his blasts and he was succeeded by Carlson's shift who also fired blasts. The effect of the blasts would be to loosen the rock more. Rec. p. 37. The *"rock could have been drilled enough to get it down without getting under it."* Rec. p. 37.

Plaintiff's witness, Lewis Carlson, testified:

"I was on the afternoon shift from 3 to 11. Mr. Hamilton and his partner were just ahead of me and Mr. Shields and Mr. Gillis followed me. When I went off duty at 11 o'clock that day the roof was pretty bad. * * * * It was liable to come down at any time. Just before going off that shift we fired six or seven blasts. Rec. p. 39.

That the roof should have been timbered. "I asked for timbers the last shift before Mr. Shields come on the day he was hurt. I wanted to fix up that place where Mr. Shields got hurt. Mr. Wildiz (the foreman) said that

timber was not necessary." Rec. p. 40-41. "When I went on duty at three o'clock in the afternoon I noticed a large rock in the roof of the tunnel near the breast and called the foreman's attention to it. "Q. What did he do and say? A. Well, he sounded the rock and pronounced it safe. The rock did not look very safe to me. There were two seams and the end of the rock was hanging down. That was what I was afraid of, that it would be liable to drop at any time, and there was water seeping through the seams and it was cut off in front. The blasting that I did on the last shift would naturally jar the rock and make it more dangerous." Rec. p. 41.

"The rock might have fallen on my shift, but to the best of my judgment I did not think it would. If I had believed it would I would have timbered it. I never saw any timbermen there and supposed we had to do our own timbering." Rec. p. 42.

John Wildiz, the foreman, testified:

"In driving a tunnel such as this one by blasting we must expect that some rocks will be jarred loose * * * * If a miner knows anything about mining he will take a pick or certain tools so that he can reach ahead of him as he goes and examine the roof and sides a certain distance from the place where the charge is located * * * * The miner should not go right into the face without making preliminary tests as he proceeds. I heard the testimony of Mr. Carlson that he asked me for timbers on the shift before Shields was hurt. Mr. Carlson did not make such a request of me. Mr. Gillis did not ask me for

timbers for a place in this tunnel near the entrance. I never was asked for any timbers there because we had timbers laying there." Rec. p. 61-62.

Witnesses for plaintiff in error, Ellis Roberts, Rec. p. 64-65, Romanio Marquette, Rec. p. 66 and Geo. Morris, Rec. p. 67, all corroborated Wildiz upon the point that a miner should not go right into the face of a tunnel where blasting has been going on without first examining ahead of him for loose rock.

We think the above statement from the evidence will be sufficient to enable the court to pass on the points involved in this appeal.

ARGUMENT AND AUTHORITIES.

We submit that the foregoing statement, and particularly plaintiff's own testimony makes a typical case of assumed risk and contributory negligence. There is a well defined distinction between these two defenses. The defense of contributory negligence rests upon some fault or ommission upon the part of plaintiff, and is maintainable when, though the defendant has been guilty of neligence, yet the negligence of the plaintiff has intervened as the direct and proximate cause of the accident. Contributory negligence is a tacit admission of negligence on the part of defendent, and defeats the cause of action that accrues to plaintiff by reason thereof. On the other hand, assumed risk, at least in one of its phases, arises out of an implied contract that the servant will assume the risks ordinarily incident to the service for which he is

paid. This defense does not admit negligence on the part of defendant and defeat the right of action therefor; for where the injury is the result of a risk assumed by the servant no right of action arises, as the master owes him no duty to protect him against dangers the risk of which he assumesd. While it is a general principal that the servant does not assume the risk of injury from the master's negligence, there is an important qualification of the rule known as the doctrine of obvious, as distinguished from ordinary risks, Knisley vs. Pratt, 42 N. E. 986, which is particularly applicable to the facts of this case, for *it is well settled that a servant assumes the risk even of injury from the master's negligence where he knew of such negligence and understood, or as a man of ordinary intelligence, ought to have understood and appreciated the risk and danger alleged to arise therefrom.*

So far as this case is concerned the distinction between these two defenses is plain and easily understood. Thus, we contend that, as defendant in error was a man of wide experience in the business of mining and knew of how this mine was conducted; knew of the obstructions on the floor of the tunnel; knew of the failure to provide muckers and timbermen; knew that no timbers were furnished, (if it be a fact that none were furnished) and knew of the condition of the roof at the time of the injury, and fully appreciated the risk and danger alleged to arise from these alleged defective conditions he must be held to have assumed the risk, regardless of whether he was guilty of contributory negligence in the manner in which he undertook to perform his duty of inspection. On the other hand, if, with all this knowledge, he crossed directly

beneath the impending rock he not only assumed the risk, but *was guilty of contributory negligence for unnecessarily exposing himself to a known danger. Choctaw etc. Ry. vs. Jones* 92 S. W. 244.

An employee assumes not only the risk of injury incident to the service, but as well those risks arising out of defects or imperfections in the thing with or about which he works that are known to him or are open and obvious, even though the master is chargeable with negligence for permitting such defects and imperfections to exist. Thus Harvey vs. Mining Co., 70 Pac. 1001 (Colo) was an action by an employee in a mine to recover for injuriesreceived through the negligence of the master in failing to provide fire protection in a tunnel, and maintaining inflammable shacks at the mouth of the tunnel, but is was held that *although the master was negligent in these particulars,* yet as the evidence showed that *"plaintiff, with knowledge or the means of knowledge equal to that of his employer concerning the alleged condition of his working place, undertook his work and continued the same without any.*.*.*.*promise upon the employer's part as to the alleged negligent condition, he thereby assumed the risk arising from the alleged negligence of the defendant."* Citing several cases which are also directly in point.

"The general rule is that where the master and servant are possessed of equal knowledge, or means of knowledge, of defects and dangers, or where they are equally ignorant thereof, the servant assumes the risk; and the same is true a fortiori where the servant has better

means of knowledge than the master." Cyc. Vol. 26, p. 1202, where a great number of authorities are cited.

In West vs So. Pac. Co. 85 Fed. 382 (C.C. A.) a brakeman was injured by stepping into an open culvert and the negligence charged was the failure to cover the culvert, but it was held that as the plaintiff accepted employment and continued in the service knowing that the culverts were uncovered he assumed the risk and could not recover.

In Bier vs Hosford 35 Wash. 544 an employee of a laundry was injured by her hands being caught in an unguarded mangle, but it was held that as she knew the machine was not guarded and voluntarily continued to use it she assumed the risk, and could not recover.

Southern Pacific Co. vs Seley 152 U. S. 142, 38 L. Ed. 391.

In this case an employee of a railroad company caught his foot in an unblocked frog and was run over and killed. The negligence charged was permitting the frog to be unblocked. "The evidence showed that Seley had been in the employ of the defendent for several years as brakeman and conductor of freight trains; that his duty brought him frequently into the yard in question to make up his trains; that he necessarily knew of the form of frog there in use, and it is not shown that he ever complained to his employers of the character of frog used by them. He must, therefore, be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers asserted to arise out of the use of unblocked frogs."

Citing Washington etc. Ry. vs McDade 135 U. S. 554, 34 L. Ed. 235, where it is said:

"If the employee knew of the defect in the machinery from which the injury happened and yet remained in the service and continued to use the machinery without giving notice thereof to the employer he must be held to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery."

It is also held in the Seley case that plaintiff was guilty of contributory negligence as matter of law.

"That Seley was guilty of contributory negligence, and therefore not entitled to recover, we think is also obvious. Knowing, as he did, the character of the frog, and the liability of being caught in it, and after being specially warned by the assistant brakeman, he yet persisted in exposing himself to an obvious danger. His object to couple the cars might have been successfully accomplished without placing his foot in the frog. Recklessness could hardly go further. The evidence would warrant no other conclusion than that he took the risk of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death." Citing Randall vs B. & O. Ry. 109 U. S. 478, 27 L. Ed. 1003 and other cases.

The Seley case is cited and followed in King vs Morgan 109 Fed. 446.

Other cases in point upon the question of assumed risk are Riley vs. L. & N. R. Co. 133 Fed. 904, C. C. A. and

St. Louis Cordage Co. vs. Miller 126 Fed. 495, C. C. A. Eight Circuit.

In the Miller case plaintiff's fingers were injured in an unguarded cog. While the cogs were guarded when she entered the employment they had been uncovered for six weeks prior to the accident and she had used the machine 10 or 15 minutes each day during the six weeks.

The court refused to direct a verdict and instructed the jury "that the servant did not assume the risk of the exposed machinery unless the danger from it was so imminent that no ordinarly prudent person would have incurred it."

Held that the servant, by continuing in the employment without complaint, assumes the risks of the defects and dangers which arise during the service, to the same extent that he assumes those which existed when he entered the employment. (2). That the defense of assumption of risk was not dependent in any way upon the imminence of the danger, *but is based upon the knowledge of the servant of the conditions which brought about the injury, and* (3) *that the defect being obvious and the danger therefrom just as apparent to the servant as to the master the lower court should not have submitted the case to the jury, but should have directed a non-suit.*

Glenmont Lbr. Co. vs. Roy 126 Fed. 524.

This is a very instructive case on assumed risk and contains a clear statement of the principles governing the federal courts in granting motions for directed verdicts.

See also on this subject the following cases directly in point.

Higgins Carpet Co. vs O'Keefe 79 Fed. 900 Cir. Crt. App. 2nd Cir.

Marshall vs. Norcross 77 N. E. 1151.

Kinsley vs. Pratt 42 N. E. 987.

Denver & R. G. Ry. vs. Noigate 141 Fed. 247.

In view of the testimony of defendant in error and that of his witnesses to the effect that he was a miner of wide experience, having been a boss a one time, and that he knew of every single fact and circumstance existing in connection with the mine which it is sought to charge against plaintiff in error as negligence authorizing a recovery, and the further fact that he knew of the particular danger arising out of the condition of the roof of the tunnel at and prior to the time he was injured, we insist that under the general rule illustrated by the authorities cited and many more that might be cited, defendant in error must be held to have assumed the risk of the injuiry he received. If we examined each allegation of negligence made in the complaint and supported by evidence it will be seen that the alleged negligent condition and the danger arising therefrom were as well, or better known, to defendant in error than to plaintiff in error. Thus (a) "allowing the rock and dirt to accumulate on the floor of the drift." It is undisputed that this condition was known to defendant in error. (b) "Failure to timber the roof of the drift." This condition was, of

course, known to him. (c) "Careless management of the mine and failure to inspect." He had been working in the mine for a considerable time and of course knew the manner in which it was conducted. (d) "Failure to comply with the regulations prescribed by law for the inspection etc. of the mine." There are no such regulations prescribed by law. (e) "Failure to provide muckers to remove the broken rock." (f) "Failure to provide timbermen to timber the mine." Defendent in error knew that no muckers were provided for regular work in the mine, and knew that no timbermen were provided, it being his own duty to do his timbering. (g) "In failing to provide a safe place for plaintiff's work." He knew all about the place provided. Knowing of all of the various matters charged as negligence it is elementary law that he assumed the risk of injury arising therefrom, provided, of course, he appreciated the danger. That he did is unquestioned. He was a miner of the widest experience. He had worked in nearly all of the Western mining states, in some of them as a boss. In his testimony he was offered and accepted as an expert and shows that he possesses intimate knowledge of mines and the dangers incident to working therein and the precautions that should be taken to guard against injury therefrom. The truth of this is forcibly illustrated by his testimony with reference to what he should have done upon discovering the dangerous character of the roof. He says himself that he should not have worked under this rock; that "he is not supposed to committ suicide." His testimony with reference to the manner miners habitually go into mines picking out the safest places and avoiding the middle of

the tunnel shows that he fully understood the danger, yet when he was injured he was doing the opposite of what his whole training as a miner and all that he had learned in the business told him to do. He voluntarily, and unnecessarily undertook to cross the tunnel directly under the rock which he had just examined and said he knew to be imminently dangerous. We submit that under the general rule this case should have been taken from the jury and a verdict directed for defendant.

But aside from the application of the general rule of Volenti non fit injuria, there are special facts in this case which bring it within a rule of less universal application. It may be thus stated:

Where the work which a servant is employed to do consists in making a dangerous place safe, or where the performance of his work constantly causes a change in the character of the place for safety, the rule requiring the master to furnish a reasonably safe place in which the servant may perform his work does not apply, but in such cases the servant assumes the risk of the dangerous place, and of the increased danger caused by his work.

A typical case applying this principle is Finalyson vs Utica M. & M. Co. 67 Fed. 507 (C C A). In this case it was the plaintiff's duty to do the timbering in the dedefendant's mine and in the performance of this duty it became necessary for him to work under an impending mass of rock and earth which had been jarred loose by blasts fired in the roof of the mine to dislodge the ore. It was plaintiff's duty to timber up this rock and while en-

gaged in doing so it fell and killed him. The court said:

"It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his service. *But this rule cannot be justly applied to cases in which the very work the servant is employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight.. When he engages in the work of making a place that is known to be dangerous safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them. Armour vs. Hahn* 111 U. S. 313, *Minneapolis vs. Lundin* 58 Fed. 525, *Ry. vs. Jackson* 65 Fed. 48 * * * * Austin and Finalyson were engaged in stoping out ore and timbering the space opened by the stoping. The blasting necessarily made the place opened by it insecure. There was constant danger of the fall of material loosened by the blast * * * * It was not the negligence of the foreman but the necessary progress of the work that made the place insecure, and the dangers from the fall of these loosened materæials, which someone must take in order that the timber should be placed in

the mine at all,Finalyson voluntarily assumed when he entered upon this employment."

See also Col. F. & I. Co. vs Lamb 40 Pac. 251, and Kellyville Coal Co. vs Bruzas 79 N. E. 309.

We submit that the case at bar falls within the reason of the Finalyson case. Plaintiff's own testimony shows that it was his own duty to make his own examination of the conditions at and about the place where he worked, and if the place was unsafe it was his duty to make it safe. As said in the Finalyson case. it was not the negligence of the foreman or of the defendant that made the place dangerous but the progress of the work defendant in error was employed to do which caused a constant change in the character of the place for safety in which he worked, and if he was injured by a fall of rock while engaged in making an inspection preparatory to making the place safe it is surely a risk incident to the performance of his work and one which he assumed by entering upon and remaining in the employment. As said in the Finalyson case, someone must be charged with the duty of making these inspections, otherwise the place could never be made safe. and the complaint of defendant in error that the place was not made safe for him, in its last analysis, amounts to a complaint that plaintiff in error did not employ other men to do the work which defendant in error was employed and paid to do, thus rendering the performance by him of his own work unnecessary.

Russell Creek Coal Co. vs Wells 31 S. E. 614 is identical in all material respects, and even in most of the immartial details, with the facts of this case.

There a miner received injuries from the fall of a piece of slate in a coal mine. It appeared from his own testimony that he was an experienced miner but had been working for defendant but a few days. "I put in a blast and then went outside while it went off. * * * * When I went back I started to put up my pick to see if the roof was safe, but before I got the pick up, and before I touched the roof the slate fell on me. It is always the custom to examine the roof after a shot * * * * The accident could only have been prevented by putting in a timber to hold up the slate * * * * and I understood it was the company's business to put in these timbers."

On cross examination he testified in substance.

"That he had never seen any timbers at that place. As a rule they are not necessary. It was only occasionally they had to be set. If there was loose slate over the trackway it was necessary to either pull the slate down or to set cross timbers or collars. If there was loose slate and the miner knew it he would take it down if he could. The day before the accident happened my partner had been pulling with his pick at a piece of slate in the roof about the point where I was struck. Collins tried to get this piece of slate down but could not do it and told me it was safe * * * * I considered it safe * * * * I do not know whether it was loose before that or not. It might have been the shot that loosened it. After a shot is fired it is the miner's duty to examine the roof for loose slate, and if a piece of slate falls while he is examining the roof I suppose it is a pure accident." „

The defendant's foreman testified "all collars and

timbers which have been set have been set by the miners themselves."

It also appeared from the foreman's testimony that plaintiff had pointed out the slate which afterwards fell and he had told plaintiff to prop it.

The trial resulted in a verdict for plaintiff.

The court say:

"It is shown that if the room in which plaintiff was at work was bad, before he sent off the shot just preceding the accident, he knew it, and promised to set a prop under the piece of slate, but did not do it, and the evidence of plaintiff shows that it was his duty to watch the roof all over the room * * * * and that if it needed propping it was the rule and custom in the mine for the miner to prop it * * * * The plaintiff not only neglected to do as he was instructed by the mine boss but went almost immediately after sending off a shot in the mine, which might have, as he admits, loosened the slate, and under the piece of slate to see if it was loose. He says this was his duty, and it does not appear that it was the duty of the mine boss to inspect the mine after every shot, which would have been a most unreasonable requirement * * * * The evidence does not show that the accident was due to the neglect of defendant to inspect the mine, but that it occurred when plaintiff was on his tour of inspection. which was a part of his duty after each shot sent off by him * * * * He assumed the risk and must have known the danger, as he was not a stranger to such work * * * * Knowing the unsafe condition of the place in which he

was working, the plaintiff was not compelled to continue the work. and if he continued the work without exercising ordinary care and prudence for his own safety, he must be held to have assumed, not only the ordinary risks incident to the service when he entered upon it, but such as became known to him in the progress of the work, or which were readily discernible by a person of his age and capacity in the exercise of ordinary care. We are of opinion that the motion for a new trial should have been sustained."

The only difference between these two cases is one of mere detail. In the case cited it appears that plaintiff called attention to the danger and was told by the foreman to prop it up, and failed to do so. But this is immaterial except to show that it was plaintiff's duty to do this work. Thus, suppose no such command had been given or he had been injured while propping the slate in obedience to the command clearly the decision would not have been different. In Shields' case there was no direct command given him to do the inspecting. but it was made his duty to do so by the general course of business in the mine.

Cushman vs. Carbondale Fuel Co. 88 N. W. 817.

Plaintiff was employed in a mine as a driver hauling coal in cars drawn by mules and was injured by a rock falling on him while driving through a passage. The defense was assumption of risk. It was held the defense was not good because "he was a driver and it was no part of his duty to inspect the mine," but from the reasoning of

the court it is quite plain that had it been plaintiff's duty to inspect the roof the defense would have been good. To the same effect see Corson vs Coal Hill Coal Co. 70 N. W. 185. It is there held that a servant whose duty it is to ride coal cars coming out of a mine does not assume the risk of injury from falling slate, because it was no part of his duty to examine the roof, and the distinction is drawn between cases where it is the servant's duty to inspect the place of work with a view of making it safe, and those where it is no part of his duty to do such work. In the former case he assumes the risk and in the latter he does not, unless, of course, he knows the danger.

Island Coal Co. vs. Greenwood 50 N. E. 36.

Plaintiff was a coal miner and was injured by a fall of coal from the roof at the place he was at work. The defense was assumed risk. The following quotation from the opinion sufficiently explains the case.

"Employes are rightly held chargeable with knowledge of the condition of the tools and parts of the machinery and appliances which they use or with which they come in contact. The same is true of the places in which employes are at work and with which they are in immediate contact. The condition and dangers of such places are liable to change from hour to hour, as the work progresses. and the employee himself has much better means of knowing of such conditions and dangers than his employer can possibly have. An important consideration in such cases, as said by the Supreme Court of Iowa in Corson vs. Coal Co. 70 N. W. 185 is whether the structure, appliance or instrumentality is one which has been

furnished for the work in which the employee is engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. So in *Finalyson vs. Mining Co.,* 67 Fed. 507, where an employee was injured by material falling from the roof of a mine, it was held that the rule as to providing a safe place to work did not fully apply to a case where the work consisted in making a dangerous place safe or in constantly changing the character of the place for safety as the work progressed. The case of falling top coal in such a case as the one before us is not unlike the caving in of a gravel pit, where it has been frequently held by this court that the employee assumes the risk of such a possible danger which is alike open to the observation of employer and employee. The jury here find that both appellant and appellee knew that a part of the top coal was left adhering to the roof of the place where appellee began work. Appellee found the coal, as he and his assistants believed, to be so fast to the roof as to be absolutely free from danger. In this it turned out they were mistaken, whether the defect then existed or was brought about by causes arising after appellee and his assistants had begun their work. *Having equal or better opportunity than appellant for knowing the danger threatening him it would seem that appellee could have no right of action.''*

CONTRIBUTORY NEGLIGENCE.

Passing from the question of assumed risk to that of contributory negligence, we submit that the act of de-

fendant in error in crossing the tunnel directly under the rock with the knowledge which he had of its condition and the imminent danger of its falling was contributory negligence as a matter of law, and the motion for a directed verdict should have been sustained on this ground, even if properly denied on every other. The undisputed proof shows that there was no necessity for defendant in error to pass directly under the rock in order to reach the hammer. The hammer was on the opposite side of the tunnel near the wall and could have been reached by going a few steps back from the face of the drift and then across the tunnel at a point where the roof was not bad. All of the witnesses for defendant testified without contradiction that a miner should not go into the face of the drift where blasting has been going on without first making an examination for loose rocks, and this testimony was uncontradicted. Besides, defendant in error testified that he was not supposed to commit suicide by working under loose rocks, and that if it was dangerous he had no business to be there. He further testified that in making the test to ascertain whether rocks were loose it was customary and proper to assume a position that would be as safe from danger of being hurt by the rock if it fell as possible. He also testified that in going into a tunnel he should have kept to one side as it was safer there than in the middle. Yet, notwithstanding all this he walked directly under the rock. If he had used the precautions on this occasion which he testified miners always use to pick out the safest place he would not have been hurt.

Southern Pac. Co. vs. Seley, 152 U. S. 142, 38 L. 391, already quoted.

Tuttle vs. Ry. 122 U. S. 30 L. Ed. 1114.

In this case the negligence charged was the construction of a switch track with so sharp a curve as to cause the draw heads of cars being coupled to pass each other, whereby plaintiff's decedent, while attempting to couple cars, was caught and mashed. It appears that deceased stood on the inside of the curve where the corners of the cars would come together and crush a person, whereas on the outside of the curve the corners are far apart and would not be dangerous. It was held that deceased was guilty of contributory negligence, the court saying:

"It is for those who enter such employments to exercise all that care and caution which the perils of the business demand. The perils in the present case arising from the sharpness of the curve were seen and known * * * Everything was open and visible and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw bars passing each other when the cars were brought together. It was his duty to look out for this and advoid it. The danger existed only on the inside of the curve." * * *

Under the decisions of the Supreme Court of Washington defendant in error would be clearly guilty of contributory negligence as a matter of law for having unnecessarily exposed himself to a known danger, which he could just as well and conveniently have avoided.

Stratton vs. Nichols Lumber Co., 39 Wash. 323, 81 Pac. 831, where plaintiff in the performance of his work assumed a position near a set screw and was injured. The proof showed that he could just as well have performed the work without coming into proximity to the set screw, and it was held he was guilty of contributory negligence. If one is to be held guilty of contributory negligence under these circumstances, where the danger was by no means imminent, how much more so was defendant in error, who unnecessarily assumed a position under the rock contrary to the rules and customs governing miners which no one knew better than himself. We submit that his conduct in this respect was gross negligence as a matter of law, and the court erred in submitting the issue to the jury and in denying the motion for a directed verdict.

Defendant in error contended at the trial that assumption of risk was not available as a defense, basing this contention on the Act of 1897 relating to mines, and particularly Sec. 10, which is as follows:

"Protection from Caving: Sec. 10. The owner, agent or operator of any coal mine shall keep a sufficient supply of timber at any such mine where the same is required for use as props, so that the workmen may at all times be able to properly secure the said workings from caving in, and it shall be the duty of the owner, agent or operator to send down into the mine all such props when required, the same to be delivered at the entrance of the working place." Pierce's Code Sec. 6507, Ball. An. C. & St. Sec. 3178.

In *Green vs. Western American Co.,* 30 Wash. 87 the Supreme Court of Washington held, on the authority of *Narramore vs. Cleveland Electric Co.* 96 Fed. 298, that the defense of assumed risk was not available to an employer who had violated the statute by neglecting to furnish timbers.

There is great conflict in the authorities upon this point, especially among the state courts, but the great weight of authority in the Federal Courts is contrary to the decision in the Narramore case. But before entering upon a discussion of this question we suggest that defendant in error has not brought himself within the purview of the statute quoted, as an examination of the complaint will disclose. The negligence charged in the complaint is summarized in the opening statement. Par. (b) charges a "failure to timber the roof" and Par. (d) "failure to comply with the rules and regulations prescribed by law for the * * * timbering and otherwise prudently conducting the mine". There is no other reference to timber or timbering in the complaint. These allegations cannot be construed as equivalent to an allegation that defendant failed to *"keep a sufficent supply of timber"* for use by the workmen as props. The statute does not make it the duty of the mine owner to timber the mine, or to provide for its timbering, *but only makes it his duty to deliver timber at the entrance to the working place for use by the workmen themselves.* The allegations of the complaint with reference to the failure to provide a crew of timbermen make it plain that the use of the general words quoted is to be construed with refer-

ence to the specific allegation of negligence in failing to provide a crew of timbermen to timber the mine, which is not required by the statute, and could be available only as common law negligence, the risk of which could be, and was assumed by defendant in error.

Plaintiff's case was not helped by the fact that some testimony went in the record to the effect that timbers were not furnished as the issue was not made by the pleadings. However, this testimony was positively denied by the foreman. Rec. p. 62.

We are confirmed in this opinion by the fact that the complaint does not see mto be based upon a violation of the law relating to mines, or be drawn with that law in mind, and does no more than set up a simple common law action based upon negligence in failing to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work, for it is not alleged in the complaint that ten men, or more, were employed in the mine, though it is expressly provided by Sec. 6 of the act, that the same shall not apply to mines employing less than ten men. "Coal Mine defined. Sec. 6. No coal mine shall be considered a coal mine for the purpose of enumeration in a district to increase the number of inspectors unless ten men or more are employed at one time in or about the mine, *nor shall mines employing less than ten men be subject to the provisions of this act.*" * * * We submit that there is nothing in the complaint indicating that defendant in error was relying on the Act of 1897, Pierce's Code Sec. 6497, Ball. Co. Sec. 3166.

Neither was the case so treated by the trial judge,

for he instructed the jury that all of the charges of negligence were immaterial and should be disregarded, but that they should find the defendant guilty of negligence as a matter of law by reason of its failure to supervise the work and inspect the mine, *which is not a duty prescribed by the act,* so that neither the case made by the pleadings nor the case submitted to the jury by the court's charge in any way refers to the Act of 1897 as a basis for recovery. So far as the negligence mentioned in the court's charge is concerned, the undisputed proof showed that the system of inspection, be it good, bad or indifferent was fully known to defendant in error, and for that reason he assumed the risk arising therefrom and no cause of action accrued to him by reason thereof.

But, if this court deems the complaint sufficient to bring defendant in error within the purview of the Act of 1897, and shall hold that it sufficiently charges a failure to furnish timbers, as required by the act, then it may be necessary to pass upon the effect of the statute on the defense of assumed risk, for if defendant in error did not assume the risk the case should have been submitted to the jury on that issue alone as there was a conflict of evidence as to whether timbers were furnished and as to whether they were needed, defendant in error and his witnesses swearing that timbers were needed and none were furnished, while the foreman swore that timbers were furnished, but that they were not needed, and in this he was supported by three other witnesses.

The leading case in support of the position of defendant in error is

Narra more vs. Cleveland etc. Ry. 96 Fed. 298.

This case is the only one by a Federal Court so holding. The following cases from state courts are in line with the Narramore case:

Green vs. Western American Co., 30 Wash. 87.

Spring Valley Coal Co. vs. Patting 71 N. E. 371, (Ill.).

Island Coal Co. vs. Swaggerty. 62 N. E. 1103, (Ind.).

In*Coal Co. vs. Cuthbertson,* 76 N. E. 1060 (Ind.) it was held that on grounds of public policy a servant could not assume the risk of the failure of the employer to keep a supply of timbers on hand as required by statute.

Hailey vs. T. & P. Ry., 37 So. 131 (La.) holding that the failure to erect tell tales a little distance from an overhead bridge, as required by statute, created a risk which the employee could not assume.

Murphy vs. Grand R. V. Works, 106 N. W. 211, (Mich.).

Bair vs. Heibel, 77 S. W. 1017, (Mo.) holding that a servant did not assume the risk of being caught in unguarded cogs required by law to be guarded. See also

Stafford vs. Adams, 88 S. W. 1130, (Mo.).

Kilpatrick vs. Ry. 52 Atl. 531, (Vt.).

In addition to these cases the latest case we have been able to find is

Western F. & M. Co. vs. Bloom, 90 Pac. 821, (Kan.), which was a case of failure to guard machinery, as required by law.

Cases holding that the defense of assumed risk is not taken away are the following:

Denver & R. G. Co. vs. Norgate, 141 Fed. 247 (Cir. Court of Appeals Eighth Circuit from Colorado).

St. Louis Cordage Co. vs. Miller, 126 Fed. 495 (C. C. A. Eighth Circuit from Missouri).

Glenmont Lbr Co. vs. Roy 126 Fed. 525 (C. C. A. Eighth Circuit from Minnesota).

Higgins Carpet Co. vs. O'Keefe, 79 Fed. 903 (Circuit CourtAppeals from New York, Second Circuit).

Marshall vs. Norcross, 77 N. E. 1151, (Mass.).

This has always been the established doctrine in New York as shown by a long line of authorities.

Jenks vs. Thompson, 71 N. E. 266 (N. Y. App).

Sitts vs. Knitting Co., 87 N. Y. Supp. 911.

Knisley vs. Pratt, 42 N. E. 987 (N. Y.) is a leading case.

Fleming vs. St. Paul Ry. 6 N. W. 448 (Minn.).

Krause vs. Morgan, 40 N. E. 886, (Ohio).

Johns vs. Cleveland etc. Ry. 23 Ohio C. C. affirmed without opinion, 70 N. E. 1124.

Kreider vs. Wisconsin etc. Co., 86 N. W. 662, (Wis.).

These cases are in addition to the great number of cases cited in the Norgate case.

Many other decisions from the courts of the same states could be cited, but we know of no other state court that has decided this question other than those whose decisions have been cited. Judge C. H. Hanford, who tried this case, in an opinion reported in 133 Fed. 979, *Nottage vs. Sawmill Phoenix* followed the weight of authority in the Federal Courts, and in the case of *Welsh vs. Barber Asphalt Co.,* decided by the Circuit Court at Portland and now pending on appeal in this court from a judgment in favor of defendant the same ruling was made.

The opinion in the Norgate and Miller cases, as well as a number of others, have discussed this question at great length so that there is nothing that can be added thereto, and we shall do no more than refer the court to those cases, confident that this court will follow the great weight of Federal authority supported, as it is, by the weight of authority in the state courts.

But it may be contended that this court is bound to follow the decision of the Supreme Court of Washington on the ground that the decision of the highest court of a state construing a state statute is binding upon the Federal Courts. Upon this point we take the position that this question is purely and simply one of general law

and this court is not bound to follow the decision of the Supreme Court of Washington. The statute is not vague or doubtful in its meaning. Its terms are plain and unambiguous and not subject to construction or interpretation. The Supreme Court of this state has simply held that for *reasons of public policy* assumed risk is not available as a defense, admitting and conceding that the statute itself does not pretend to abolish this principle of the common law. An examination of the foregoing citations will show that the Supreme Court of Missouri in *Bair vs. Heibel,* 77 S. W. 1017 held that assumed risk was not available, yet the Circuit Court of Appeals in a case from Missouri, *St. Louis Cordage Co. vs. Miller,* 126 Fed. 495, and arising under the same Missouri statute, held to the contrary, which it could not have done had it regarded the question as one of statutory construction as to which they were bound by the decision of the state courts. Judge Hanford in *Nottage vs. Sawmill Phoenix,* 133 Fed. 979 took the same view.

NEGLIGENCE OF FELLOW SERVANT.

As pointed out in another place, if there is any negligence in the case that will authorize a verdict for defendant in error it is the failure of the foreman, Wildiz, to furnish the timbers, as required by law. We concede that if the defense of assumed risk is not available on account of this duty being one prescribed by statute the case should be reversed and remanded for a trial upon this issue alone, peremptory instructions being given to find for defendant as to every other act of negligence

charged, unless, of course, our contention as to contributory negligence be sustained, and unless the contention that we now make that the so-called foreman, Wildiz, was a fellow servant of defendant in error, and not a vice-principal, be upheld.

Our contention on this point may be thus stated.

While it is the non-delegable duty of the master to exercise ordinary care to furnish and maintain a reasonably safe place in which the servant is to work, yet, if the place furnished is reasonably safe in the first instance, and by the negligent manner in which the boss or foreman of a gang of men directs the work to be done, or the needed precautions taken, whereby the servant is injured, the boss would be regarded as a fellow servant and no recovery could be had for his negligence. Especially is this true where, as in this case, the duty to make the place safe devolved upon the servant, as well as upon the mine boss.

As already pointed out, the evidence of plaintiff himself showed that it was his duty to make his own inspection for the ascertainment of the condition of the roof and sides of the tunnel, and to report the same to Wildiz, whose duty it then became to furnish timbers for plaintiff's use. In other words, the duty to make the place safe was a duty incumbent on the one as much as the other. It was the duty of both, and under these facts the failure of the pit boss to take the needed precautions for making the place safe was negligence of a fellow servant for which defendant is not liable.

Russell Creek Coal Co. vs. Wells, 31 S. E. 614.

Plaintiff was a coal miner and was injured by a piece of slate falling from a roof where he was at work. The negligence alleged was the failure of the pit boss or foreman, Evans, to timber or otherwise make the place safe. Defendant asked the following instruction:

"The court tells the jury that if they believe from the evidence that the accident was due to the negligence of the mine boss, then the negligence was the negligence of a fellow servant, and plaintiff cannot recover."

The court says:

"This instruction proceeds upon the idea that the mine boss was, under all circumstances, to be considered as the fellow servant of the plaintiff, for whose negligence the defendant was not responsible. It should have discriminated between the duties imposed upon the mine boss which were not assignable, and with respect to which the defendant company could not relieve itself from liability, and his duties affecting the mere administration of the work, with respect to which he might properly be regarded as a fellow servant with the deceased.

It is the duty of the master to furnish and maintain a reasonably safe place in which the servant is to work, and this duty is personal to the master. *But if the place is reasonably safe in the first instance, and is afterwards rendered unsafe by the negligent manner in which the boss or foreman of a gang of hands directs the work to be done,* in doing which an injury is inflicted, the master

is not liable for such injury. *Locomotive Works vs. Ford* 27 S. E. 509.

While it was the duty of defendant company to provide a reasonably safe place in which the plaintiff was to work and this duty it could not assign to another, *yet, if it was in the first instance in a reasonably safe condition, and afterwards rendered unsafe by the negligent manner in which the mine boss directed the work to be done, or the needed precautions taken,* whereby the plaintiff was injured, the mine boss would be properly held a fellow servant of plaintiff, or that this was one of the risks assumed by plaintiff when he entered the employ, or when apprised of the danger and continued his work, *especially if the evidence showed that, from the nature of the work, the condition of the place was constantly changing, and the duty of keeping it in a safe condition, in the prosecution of the owrk devolved both upon the plaintiff and the mine boss."*

This is exactly the situation with respect to plaintiff, Shields. The place he was at work was one that was constantly changing as to safety, and this condition was brought about by the prosecution of the work in which plaintiff was engaged, and it was admittedly his own duty to make the necessary inspections. In so far as the foreman's duties consisted in making the place safe they were only co-extensive and equal to plaintiff's duties. Fellow servants are universally defined to be those engaged in the same common work, to the same purpose for the same master, and it is quite clear that so far as the duties of plaintiff and the pit boss to inspect the mine

and avoid the danger thereby disclosed is concerned they are fellow servants within this definition.

This distinction is recognized in

Carson vs. Coal Hill Coal Co., 70 N. W. 185.

Where it is said:

"Considerable attention is given in argument to the rule as to injuries resulting from the negligence of a fellow servant. * * * *It is not as if he had been working in one of the rooms where coal was mined and put on the cars, for there the looking after and keeping safe the room was a part of the work assigned to the miner, and is incidental to his work.*"

The reason for the distinction would seem to be that where the miner is charged with a duty of inspection or keeping the place safe, he is engaged, for those purposes, in the same common employment as his so-called boss, and they are fellow servants inasmuch as they are charged with the performance of the same kind of work. And further that the rule does not extend to a supervision of the mere details of the work.

This distinction is thus stated in CYC.

"The duty devolving upon the master to furnish his servants a safe place to work *in the first instance* is one which cannot be delegated * * * This rule does not extend, however, to negligent acts of a servant making a safe place unsafe, *nor where the negligence relates to details of arrangement and execution in keeping a safe place.* Where the place for work is reasonably safe the

master is not liable for the negligence of a superior servant in placing the injured servant at work in a certain place which is dangerous."

It is not pretended by defendant in error that the company did not provide the timbers for use by the men, *but only that the foreman, Wildiz, did not furnish them for their use.* The testimony of Wildiz that he had the timbers there is uncontradicted. This being true we insist that plaintiff in error has discharged its full duty, and that the only negligence shown, if any, is that of a fellow servant, for which plaintiff in error is not liable, this being, as already pointed out, a common law action. Of course, if the court upholds our other contention that the failure to furnish timbers was not alleged in the complaint as a ground of recovery and is therefore not available, or that the risk was assumed, or that he was guilty of contributory negligence, it will not be necessary to decide this point, but conceding that it is sufficiently alleged it amounts to nothing more than negligence of a fellow servant.

CHARGE OF THE COURT:

The Ninth Assignment, Rec. p. 97, complains of the charge of the court for having instructed the jury that defendant was guilty of negligence as a matter of law for failure properly to inspect and supervise the mine. This charge is erroneous for several reasons. In the first place, if it be conceded that defendant was negligent in these particulars, nevertheless this negligence was not

accident. Thus, suppose there had been perfect supervision and inspection so that the conditions in the mine were perfectly well known to defendant, it is obvious that the mere knowledge of the conditions would have in no way prevented the fall of the rock unless some steps for remedying these conditions had been taken, which could only have been by taking down the loose rock or propping it up, both of which it was the duty of defendant in error to do. It is perfectly plain that the proximate cause of the accident, from the standpoint of defendant in error, was the failure to furnish timbers, for several witnesses testified that if they had had timbers they would have timbered the rock which fell. Upon this issue there was a conflict of evidence, as plaintiff in error offered testimony to show that timbers were furnished. We submit that it is manifest that if this case should have been submitted to the jury at all it should have been submitted upon the single issue whether or not plaintiff in error furnished timbers for use of the workmen in timbering the mine. The other negligence charged was no more the proximate cause of the accident than the failure to inspect. For instance permitting an accumulation of rock and debris on the floor of the tunnel. It needs no argument to show that this fact had nothing to do with the fall of the rock or with plaintiff's being under it when it fell. The failure to provide timbermen cannot be relied on as negligence for the simple reason that it was part of the miners' duty to do their own timbering. We think it too plain for argument that the court's charge is fundamentally wrong for having held the defendant liable for alleged negligence which did not contribute to

the accident in the remotest degree.

The court's charge is wrong for another reason. The uncontradicted evidence of plaintiff's own witnesses proved that there was an inspection of the tunnel and that the foreman Wildiz was fully informed of the conditions. "When I went on duty at three o'clock in the afternoon I noticed a large rock in the roof of the tunnel near the breast and *called the foreman's attention to it.* Mr. Wildiz was the foreman. That was before (between) four and five o'clock. Q. What did he do and say if anything? A. Well he sounded the rock and pronounced it safe." Carlson Rec. p. 41. This conclusively shows that there was inspection of the tunnel the very day of the accident, and that the foreman was familiar with the conditions. It is thus made clear that the only negligence that will support a judgment for defendant in error is the failure of the foreman to provide the timbers to make the dangerous place safe, it being plaintiff's theory that the danger was well known to the foreman, but that he failed to provide the timbers. Upon this issue, as already pointed out, there was a sharp conflict in the evidence.

But aside from all these considerations, it is undisputed that defendant in error knew of the manner in which the mine was conducted and, being an experienced miner, knew how it should have been conducted, and was perfectly familiar with all of the dangers claimed to arise out of the conditions as they existed, and therefore, by reason of these alleged negligent acts and omissions, as well as all others of which he was informed, no cause of action arose in his favor. *St. L. Cordage Co. vs Miller*

126 Fed. 495; *Glenmont Lbr. Co. vs. Roy,* 126 Fed. 525. Under these facts the defense of assumption of risk was conclusively established and the court should not even have submitted the alleged negligence in these particulars to the jury. *Glenmont Lbr. Co. vs. Rou. supra.*

Furthermore, the duty to inspect and supervise is not one prescribed by law, and therefore the failure to do so is not negligence as a matter of law as in cases of the violation of a statutory duty. We concede that where an act or omission is so plainly and palpably negligent as that reasonable men could form but one opinion a court is authorized to declare such act or omission negligence as a matter of law, but this case is not of that nature. Under the evidence we submit that, to say the least, it was a question for the jury whether plaintiff in error was negligent by reason of the alleged failure to supervise the work and inspect the mine.

We submit that this error in the court's charge will require a reversal of the judgment.

REFUSAL OF REQUESTED CHARGES.

The Tenth Assignment of Error complains of the refusal of the court to give the defendant's first requested instruction to the effect that where, in the progress of the work, the condition for safety is constantly changing it is not incumbent upon defendant to keep the place safe at all times, and where, in the discharge of his duty, plaintiff undertakes to make such dangerous place safe he assumes the risk.

This proposition of law has been considered under the discussion of assumed risk. It is undoubtedly a correct proposition and was not included in the court's main charge.

The Eleventh Assignment complains of the court's refusal to give the second requested instruction to the effect that if plaintiff knew the roof was in an unsafe condition it was negligence for him to go under it as he did.

The Twelfth Assignment complains of the court's refusal to give the fifth special charge to the effect that if plaintiff could have inspected the rock without placing himself in a position of danger, and that he voluntarily placed himself in a position of danger he was guilty of contributory negligence.

These two propositions have been discussed in connection with the assignments of error complaining of the refusal of the court to grant the motion for a directed verdict on the gorund that the contributory negligence of defendant in error precluded a recovery.

These features of defendant's case were not specifically and categorically submitted to the jury, but they were merely instructed generally as to whether the manner in which defendant in error proceeded to the face of the drift was negligent. Defendant was entitled to have the facts upon which it relied as a defense grouped and submitted categorically and specifically to the jury for them to find and say whether or not they were established by the evidence. *M. K. & T. Ry. vs. McGlamory* 35 S. W., 1058 (Tex. Sup.) is directly in point. In that case the

defendant pleaded intoxication as contributory negligence and the court charged generally as to the law of contributory negligence and followed that instruction by charging: "If you believe from the evidence that at the time he received the injuries complained of plaintiff was in a condition of voluntary intoxication, then you have a right to take that fact into consideration in determining the question whether or not plaintiff was guilty of contributory negligence, as hereinbefore explained to you." Defendant requested the court to charge: "If the jury believed from the testimony that at the time of the accident the plaintiff was in a state of intoxication, and that such state of intoxication placed him in such condition that he was unable and failed to exercise the caution and care required of him under the instruction heretofore given, and that by reason of such condition he was injured, then he cannot recover." The judgment was reversed for refusal to give this charge, the court saying:

"* * * But the charge of the court nowhere undertakes to apply the law to the evidence adduced in support of said special plea of contributory negligence. This being true, the correct rule is that defendants had the right to prepare and demand the giving of a charge requiring the jury to find whether the evidence established the existence of any specified group of facts which, if true, would in law establish such plea, and instructing them, if they found such group of facts to find for defendants; and this would be true if proper charges had been asked as to each of the special pleas of contributory negligence presented by the record. Any other rule would deprive litigants of their right to have the court

explain to the jury the principles of law applicable to the very facts constituting a cause of action or defense, so that they may intelligently pass upon the complicated issues presented for their determination. * * *"

In *G. C. & S. F. Ry. vs Walters,* 107 S. W. 369 the court submitted to the jury plaintiff's theory of the case and instructed them that if they did not believe it occured in that way to find for defendant. Defendant requested certain charges presenting its theory of the case, which was inconsistent with plaintiff's theory, and notwithstanding the court had told the jury to find for defendant unless they believed the accident occurred as claimed by plaintiff it was held reversible error to refuse these requested charges, citing the McGlamory case.

We submit that the case at bar is within the reason of the cases cited. We do not believe defendant's defense was fully and fairly presented to the jury for their determination. The court's instruction on contributory negligence was worthless to defendant and did not present to the jury plaintiff's negligence in voluntarily and unnecessarily walking under the rock.

We respectfully submit that the judgment of the court below is wrong and pray that it be reversed.

Respectfully submitted,

October 9th, 1908.

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IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT,
SAN FRANCISCO

THE TREMONT COAL & COKE COMPANY,
Plaintiff in Error,
vs.
PATRICK J. SHIELDS,
Defendant in Error.

No. 1639

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division, Seattle.

Brief for Defendant in Error

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STATEMENT OF THE CASE.

The "Statement of the Case" contained in the Brief of the Plaintiff in Error is misleading by its manner and the meagerness of important details, especially when taken in connection with the actual Record and subsequent portions of the Brief. We, therefore, beg to submit the following as presenting

more nearly the exact questions involved, and we will state so much of the evidence in connection with the pleadings as will render clear the precise points decided by the court below which are here to be reviewed.

It was alleged by the plaintiff below (defendant in error here) and not denied by the defendant below (plaintiff in error here) that he was employed as a hard rock or quartz miner in the defendant's coal mines to tunnel a cross-cut or drift from one of the lower levels of the mine to a vein of coal several hundred feet distant, and had been so engaged for some days prior to the accident in which he was injured; that he was one of a shift of two men working between the hours of 11 o'clock P. M. and 7 o'clock A. M., there being two others shifts of two men each working eight hours each; that the tunnel had progressed about 160 feet from its mouth, was six feet by eight feet in size, and the work of plaintiff and the other miners consisted in digging and blasting in the face or breast of the tunnel, it being the usual course of procedure for each shift to drill holes, place explosives therein and fire them as they retired, leaving the succeeding shift to take care of the conditions thus created; that plaintiff was an experienced miner familiar with the rules and labor of mining of various kinds; that he was injured in the manner and to the extent claimed by him while he was at work as above stated. Although formally denied in the answer, it was proved and not contested on the

trial that plaintiff came to work on his regular shift at 11 o'clock on the night of July 26, 1906, in company with his partner on the shift, one Gillis; that Gillis went right on into the tunnel, while plaintiff stopped at the entrance a few minutes to put on his jumper before following him; that one of the men on the shift that was going out spoke to Gillis about the dangerous condition of the roof of the tunnel where they were at work and told him to look out for it, but this warning was not communicated to plaintiff (*Transcript*, pp. 44-45, 47, 56); that when plaintiff reached the face of the tunnel where the work was being done, Gillis was looking at the roof and at once called plaintiff's attention to it as being unsafe or not "looking good," and plaintiff hung up his lantern on the wall and started to get a hammer to examine and test the roof, when a quantity of rock overhead fell upon him, also striking Gillis so as to stun him, and in a moment afterwards a second fall of rock covered the plaintiff; that plaintiff had not been in the tunnel five minutes when the rock fell and had done nothing but hang up his lamp and take a step or two towards getting the hammer for the purpose of testing the condition of the roof and walls (*Trans.* pp. 45-47, 51-52); that when plaintiff went off his shift at 7 o'clock that morning the roof was not in good condition, but not so obviously unsafe as to preclude prudent work there, and two shifts had intervened, considerable progress had been made in the tunnel, much blasting had been done,

the roof had been jarred and a large protruding rock had been loosened overhead, the floor was covered with a large amount of broken rock that had not been taken away during the day, so that a man could not stand upright and it was difficult to walk around and inspect the condition of the roof and walls at the point where plaintiff was at work (*Trans.* pp. 32-33, 37, 38, 39-40, 43, 47, 48, 49, 51, 53, 54-57); no timbering had been done during the day nor any inspection made nor any attempt made to clear away the broken rock blasted down by the several shifts, although the foreman of the mine was in the tunnel and his attention was called to the dangerous condition of the roof at about four or five o'clock that afternoon and one of the miners asked for timbers to protect the work, but the foreman said they were not needed and made no effort to remedy the existing conditions (*Trans.* pp. 33-34, 36, 37-38, 39-42); plaintiff had not been in the tunnel during the day since he quit work in the morning, and had no time to discover or to make any examination of the condition of the roof at the point where he went to work that night, because the whole accident happened in less than five minutes after he arrived at the face of the tunnel and while he was in the act of getting ready to make an inspection and test of the roof (*Trans.* pp. 46, 47, 49, 52-53, 57, 59).

The foregoing may be considered as admitted facts in the case, for there was absolutely no conflict of testimony on these points and no attempt upon the

part of defendant to disprove them, although denied in the answer.

The elements of negligence alleged and relied upon for recovery, with the substance of the testimony for the plaintiff supporting them, are as follows:

(1) That the defendant's agents and servants were wholly incompetent in the management and operation of mines, and reckless in the conduct, inspection and operation of this particular mine. The evidence of this is to be found at every step and stage of the testimony and is included in the several special factors of negligence hereinafter named.

(2) That defendant wholly failed to comply with the rules and regulations provided by law for the inspection, safeguarding, clearing, timbering and otherwise prudently conducting said mine. This, too, is covered and included in the other elements of want of duty and care specifically mentioned below, and embraces not only statutory duties imposed by the laws of the State of Washington, but the general duty imposed by law upon every owner and operator of mines of this character. The laws of the State, which are intended to secure the prudent and safe operation of coal and other mines, expressly require timbering, adoption, posting up and enforcement of suitable rules and regulations to be approved by the state mine inspector, and other well known and customary provisions for safeguarding the men while

at work. It was shown by the undisputed testimony of plaintiff's witnesses that none of these requirements were even attempted to be complied with by defendant. The statutes are hereafter cited and quoted.

(3) That defendant was negligent in failing to provide for the safe, proper and prudent timbering of the walls of rock and dirt in said mine, and especially at the time and place of plaintiff's injuries, and in failing to maintain an adequate and competent crew of timbermen for that purpose. Upon that point there was no contest or conflict of evidence. All of plaintiff's witnesses said that timbers were constantly needed, that they were never supplied to the men although repeatedly asked for, that no crew of timbermen existed in the mine, that the foreman refused to furnish timbers, that he said they were not necessary; that only a few hours before this accident happened his attention was called to the very rock that afterwards fell on plaintiff and he was asked to furnish timbers to prop it up, and he refused, saying it was not necessary; that the whole conduct of the work of driving this tunnel was pursued by the mine owners upon the theory that no timbers were needed on account of the character of the rock through which it was being dug, although at several places and on several occasions during the previous progress of the work the roof required timbering for safety, and for some hours or days prior to this accident the character of the ground or rock had been

changing so as to indicate the necessity for timbers. (*Trans.* pp. 32-33, 34-36, 39-42, 48, 50, 52-53, 57, 59.)

(4) That defendant was negligent in not providing and maintaining a crew of "muckers" to clear away broken rock and dirt from the drift as the miners dug and blasted it out, and in not enforcing proper rules and regulations for that purpose, and in permitting such material as well as cars and other impediments to accumulate and block up the tunnel, so as to impede the work of the miners and to interfere with their safe and convenient movements in the tunnel and in escaping in case of accident. It was not disputed that all of these facts were true. The testimony showed that no muckers were employed in the mine, that the miners were left to do the best they could in working under such conditions, and that when plaintiff on one or two occasions before that removed the accumulated rock and dirt, the foreman of the mine told him not to do it again—that he was hired to "break rock and not to muck." (*Trans.* p. 59.) The rock that had not been removed from the tunnel after the preceding shifts seriously interfered with plaintiff in his movements and examination of the roof on the night he was injured. (*Trans.* pp. 51, 54, 47.)

(5) That, finally, the defendant was negligent generally and by reason of its failure of duty in all of the foregoing respects, in failing and neglecting to furnish and maintain a reasonably safe place for plaintiff to work. (See *Complaint, Trans.* pp. 5- 11).

Upon these allegations and his proof supporting them, which is succinctly stated above in connection with the averments of the complaint, plaintiff rested his case. Defendant moved for a non-suit and dismissal of the action, which was by the court overruled. (*Trans.* pp. 59-60.) This action of the court is made one of the grounds for writ of error, as specified in the First Assignment of Errors. (*Trans.* pp. 93-94.)

In this connection it should be noticed that in the motion for non-suit one of the grounds set up is that plaintiff appears to have been injured *"by the negligence of a fellow-servant working with him at the time."* (*Trans.* p. 94.)

No such question can be raised in this court nor was it for a moment considered by the lower court. No defense of that kind was made in the answer, no testimony even tending to raise such an issue was introduced on the trial, and even had there been evidence tending that way it could avail defendant nothing, for two very good reasons, namely, that the injury was clearly the result of a failure of the defendant in its non-delegable duties, and of its concurring negligence with any fellow-servant who might be attempted to be held liable for the accident. This will be made clear hereafter.

Defendant's answer formally denied the essential allegations of plaintiff's complaint as above stated, but no serious effort was made at the trial to

contradict or to disprove them. The most that was attempted was to prove that there was no necessity for timbers or timbering, that the roof and walls were through solid rock requiring no such safeguards, that muckers were not necessary and were not provided, and that the miners were simply put to work to dig and blast and take care of themselves. (*Trans.* pp. 61-62, 63-64.) It is true that the foreman denied the testimony of the plaintiff's witnesses that he had been asked for timbers, but in the next breath he said no timbers were ever needed there and never would be, notwithstanding it was admitted by him and shown by other evidence that the roof was timbered immediately after this accident. (*Trans.* pp. 61-62, 69.)

In other words, the defendant practically admitted all of the plaintiff's allegations and proof, and sought to avoid them by the affirmative defenses of assumed risk and contributory negligence, and it relied mainly upon the plaintiff's own testimony to establish these. At the conclusion of all the testimony the defendant moved for an instructed verdict, which motion the court overruled, telling counsel what he afterwards told the jury, that the plaintiff had made out his case upon the whole proof, although it was not necessary to hold that the proof of any one of the specified elements of negligence set out in the complaint was complete in itself,—that the entire testimony, taken together, with its reasonable consequences and inferences, clearly established that the

defendant was guilty of culpable negligence and failure of duty towards plaintiff is not exercising proper supervision and superintendence over the work in the mine and in not properly inspecting and providing for the safeguarding of the work as it progressed, and especially at the time and place of plaintiff's injuries, so as to ascertain the dangerous condition which was shown to exist there and to protect the plaintiff against it in the performance of its duty to furnish him a reasonably safe place to work; and further, that this was practically admitted by the theory on which the defense proceeded and the facts which were confessed or unquestionably established. (*Trans.* pp. 78-79, 28-29.)

Thirteen specifications of error are assigned by the plaintiff in error, the first seven of which are directed to the action of the lower court in refusing the motions for non-suit and for instructed verdict, the eighth calls in question the verdict of the jury, the ninth attacks the correctness of the court's charge in holding that plaintiff had made out his case upon the allegations contained in his complaint and that the burden shifted to the defendant upon its affirmative defenses, while the last three complain of the refusal of the court to give certain instructions asked by the defendant.

Considered as a whole, these assignments present for review the following propositions or questions:

(1) Was the lower court warranted by the testimony and the law of the case in holding that the plaintiff had made out his case by the proofs, and in submitting to the jury only the issues raised by the affirmative defenses of assumed risk and contributory negligence?

(2) Did the plaintiff, by reason of his experience and knowledge as a miner and of his familiarity with the workings of that mine and the condition of the tunnel at the point and moment he was injured, assume the risk of the rock falling upon him, as one of the necessary and ordinary risks incident to his employment?

(3) Did his conduct and movements at the time and place of the accident constitute contributory negligence precluding recovery by him in this action?

To these questions, in the order given, we beg to devote the remainder of this Brief.

ARGUMENT AND AUTHORITIES.

I.

Defendant's Negligence.

An examination of the record in this case discloses a remarkable and anolamous situation under the pleadings and the evidence. Practically no contest or conflict appears in reference to the material allegations of negligence contained in the complaint or in the testimony adduced to support them, but the

defense proceeds upon the theory that none of the duties and acts of care and vigilance, the want of which is alleged and sustained by proof, was required of the mining company, but that the whole duty of exercising extraordinary caution and inspection was imposed upon the plaintiff,—in entering the tunnel, in finding out its condition at any given time, and in acting with reference to such knowledge as he had or might have had by this personal scrutiny and vigilance,—wholly irrespective and independent of the duty of the defendant to perform the primary duties plainly imposed upon it by well known rules of law and which are positive and not delegable to any one else. In other words, it is the logical effect of the contention set up by counsel for the plaintiff in error, that because Shields was an experienced miner and had been at work in the mine for some days and knew in what a reckless and incompetent manner it was managed and operated, he assumed all of the risks of such incompetency and mismanagement, and the company is absolved from all responsibility for its own negligence. No other conclusion is compatible with the argument used by opposing counsel. The foundation upon which this theory of the case seems to be constructed is that the tunnel in which Shields was working was through solid rock, required no inspection, timbering or supervision and superintendence of any kind on the part of the company and its servants, beyond the occasional visits of the foreman to see that the miners did their work of digging

and blasting. And yet when the defendant came to set out its affirmative defenses, it was alleged and sought to be proved that "the dangers and conditions which the plaintiff alleges were the cause of his injury, were open, apparent and obvious, and were in fact known by the plaintiff, or would have been known by him had he exercised the ordinary use of his senses and faculties, and that the plaintiff assumed all the risk of injury from the same." (*Trans.* pp. 14-15.) Surely, if these dangers and conditions were so obvious and open to the senses and faculties of the plaintiff, some degree of vigilance and care on the part of the defendant's foreman would have discovered them to him long before the accident that befell plaintiff as the result of such conditions, and certainly when his attention was directly called to the very condition that caused the accident, at four or five o'clock that same afternoon, and he was requested to furnish timbers to remedy it, the foreman cannot be held to have done his duty in ignoring the condition and refusing to do anything for the protection of his men. (*Trans.* p. 41.)

The position taken in the answer and in the contention against plaintiff's allegations and proof of negligence is so utterly inconsistent with that assumed in the affirmative defenses, and the dilemma in which the defendant involved itself in attempting to occupy and support both attitudes is so suicidal to any kind of rational defense of the action, that no

court or jury can be expected to regard the case in any other light than an admission on the part of the defendant that its own negligence is beyond doubt or debate. The court below made this very clear in the charge to the jury and in the memorandum decision on motion for new trial. We quote from those portions of the Record:

"Now when there is a material fact about which there is a controversy, which has been so clearly proved as to really amount to an admission and to be an uncontroverted fact in the case, the court is not required to refer that to the jury, but may determine it as a question of law; and hence in this case, the court has assumed to decide, as announced yesterday, that as a matter of law the defendant has been proven to have been negligent in this case. That does not authorize you to assume that the court has determined that this defendant is negligent in all of the particulars, or with all of the enormity alleged, but sufficient to constitute a legal liability. I have no objection to making it known to you and to the parties and their attorneys, that the negligence which appears so clear in this case as to justify the court in making this ruling, *is practically confessed by the manner of the defense.* The defense has proceeded in part upon the theory that the officers and superintendents of this mine did not know that there was danger at that particular time in the face of the tunnel, *knowledge which should have been known, or the defendant should have possessed, if there had been that degree of care in inspection and competency of supervision which was required in operating a mine, which is necessarily dangerous.* That, in connection with the undisputed testimony in the case, I think justifies the court, and therefore the court assumed the responsibility of deciding that this defendant *has been proved to have been negligent*

by reason of neglect to supervise the work of the employees and to constantly inspect the mines, so as to know as often as the shifts were changed the conditions there, and the degree of danger to which the men going into a place of that kind were exposing themselves in going there.'' (*Charge of Court, Trans.* pp. 78-79.)

"In the argument on the motion for new trial, a good deal of stress is laid upon the fact, as therein stated, that the plaintiff was probably a more experienced and competent miner than the foreman under whom he worked. *I think that this may be conceded without in any wise helping the defendant's case. All the evidence tended to prove that there was an absolute lack of intelligent superintendence of the workings in the mine.* This was so apparent that the court deemed it useless to require the jury *to struggle in an attempt to agree as to this or that particular charge of negligence. I am still of the same opinion and believe that if the jury could have acquitted the defendant as to each and every one of the matters specified in the argument upon this motion, the result would have been necessarily the same, that is to say, the defendant was guilty of negligence in carrying on the dangerous work of making excavations in a mine by means of blasting, without competent superintendence.* The questions affecting the affirmative defenses were properly and fairly submitted to the jury for decision, and there has not been pointed out any ground which I deem sufficient to justify the court in setting aside the verdict." (*Decision on Motion for New Trial, Trans.* pp. 28-29.)

That the lower court was correct in taking the issue of defendant's negligence from the jury and deciding it as a matter of law, assuming that the conclusion of negligence was the only reasonable one to

be arrived at from the testimony, we beg to cite the following decisions:

District of Columbia v. Moulton, 182 U. S. 579-580.

Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 384.

Warner v. Baltimore & Ohio R. Co., 168 U. S. 339, 348.

That the conclusion arrived at by the court below in holding that defendant's negligence was established by the evidence was clearly warranted, we call attention to the following portions of the testimony of the witnesses. All of the witnesses for plaintiff were old and experienced miners. Those for the defendant were more or less familiar with mining operations, but, excepting the foreman of the mine, did not claim to have any direct or recent knowledge of the conditions in this mine at the time of the accident, or to know any of the facts relating to this case.

The witness HAMILTON was a miner working on the morning shift in the tunnel, from 7 o'clock A. M. to 3 o'clock P. M. He testified that he worked as usual on his shift that day, and put in several blasts before going off at 3 o'clock. He further said:

"We would drill until time to go off and load our holes and fire them as we went out, and did not go back to see what the effect of the blast was."

"Q. Mr. Hamilton, what was the condition of the roof at the point where you were at work when you left there, near the breast of the cut?

"A. I considered it bad.

"Q. In what respect?

"A. Danger of caving.

"Q. Well, I will ask you what the character of the danger was, as to being immediate?

"A. Well, I considered it dangerous right at the present time.

"Q. Did you make any investigation in reference to it?

"A. I looked at it, tried to pry a chunk down that I was afraid of.

"Q. Well, what was it particularly that you thought was dangerous?

"A. Well, I was more afraid of a large stone that there was slips around that looked to me like they might cut it off, and I was afraid it would fall down. That was before I fired the blasts and I tried to pry it down but could not move it." (*Trans.* pp. 32-33.) He then describes the size, shape and location of this big rock, saying it was about three to three and a half feet from the breast of the tunnel. Proceeding:

"Q. What was the condition of the roof generally around this rock?

"A. Well, if that rock would stay there the balance of the rock would stay up, I think. * * * The rock was visible all of my shift and I worked under it from seven in the morning to three in the afternoon. *There was no timbering in the tunnel at that point, nor anywhere near there.*

"Q. I will ask you whether or not in your judgment, based upon your experience and observation as a miner, it was a proper and prudent thing to do, for the reasonable safety of the men at work in that tunnel, to have had timbers at any point point along the distance that you have described (between the entrance of the tunnel and the place where Shields was hurt)?

"A. *Yes, sir, it was.*

"Q. Why.

"A. Because it caved many times. We ran through, about twenty or thirty feet back from the breast where Mr. Shields was hurt, a short vein of coal and there was soft rock laying next to the coal, and that caved oftimes in good quantities." (*Trans.* pp. 33-34.) Again, the same witness:

"Q. I will ask you whether or not you ever saw a timber crew at work timbering there?

"A. No, sir.

"Q. Do you know whether or not the defendant company had a timber crew?

"A. I don't.

"Q. Did you ever see one? Did you see any material for putting in timbering in the mine?

"A. No, sir. Except some that I put in afterwards.

"Q. Did you ever hear any of your fellow workers ask for timber?

"A. I heard my partner say to the foreman, Mr. Wildiz, 'John, there had ought to be some timbers in here.' That occurred while we were working between where we got the coal slip and where Mr. Shields got hurt. *No timbers were furnished in reply to this request. If the point where this large rock was had been timbered the accident could not have happened.* I was never informed by Mr. Wildiz where I could get timbers in case I wanted them. In case I wanted timbers I would have gone to Mr. Wildiz.

"Q. Whose duty is it in the mine to investigate the condition of the roof and walls, with reference to the necessity for timber?

"A. *It is the duty of the foreman, and also the duty of the men working there.* If a miner sees a place in the mine he thinks ought to be timbered, he should go to Mr. Wildiz and it would be Mr. Wildiz'

duty *either to furnish timbers and instruct the miners to timber it up, or furnish timber men to do it. It is the duty of the foreman to see to the clearing away of the rock from the face of a tunnel after it has been blasted.* I visited the place where plaintiff was injured before any work had been done next morning, and found the rock I had seen in the roof lying on the floor with loose rock under it.

"Q. Did you ever see any copies of *rules and regulations* for the miners *posted up* at any point about the mines?

"A. I did not." (*Trans.* pp. 35-36, 37.)

Again, he says that "of course, where a rock is in that condition (the condition of the large stone above described) the natural consequence to be expected after a blast is that it will be loosened more." (*Trans.* p. 37.) "I don't know what my shots did, but the tunnel had probably gone in between eight and twelve inches when Shields went in after I came off of my shift. We would work eight hours and come out and just as soon as the smoke blew out the others would go in. This rock that we were working through was sandstone." (*Trans.* p. 38.)

The witness Carlson was on the next shift after Hamilton and the shift immediately preceding plaintiff, coming on at 3 P. M. and going off at 11 P. M. So that, between the time that Shields quit work in the morning and the time he came back at night, there had intervened his own blasts fired as he left and those of the two intervening shifts, all tending to make the conditions more dangerous and to change the aspect of things from what they were in the morning. Carlson testified as follows:

"When I went off duty at eleven o'clock the roof was pretty bad. *It needed timber all right. It was*

not so bad that a man could not work there, but then it was bad enough. It was liable to come down at any time. Just before going off we fired six or seven blasts in the face of the tunnel. The roof was in a bad condition. *Not very safe for a man to work there unless it was timbered."* (*Trans.* p. 39.)

After saying that the tunnel was not timbered anywhere from its entrance to the point of the accident, except at the entrance, the same witness was asked:

"Q. From your experience in mines, I will ask you whether for the reasonable safety of the men it should have been timbered?

"A. *Yes, sir.*

"Q. From the character of the roof in the tunnel at the point where the accident occurred and the intervening distance between the entrance and where the accident occurred, what ought to have been done that was not done for the reasonable safety of the men working there?

"A. *Timbered;* that is the only thing. The timber should have been put in in regular sets, two posts and a cap. During the time I was at work there (about twelve days before the accident) *I was not furnished with any timbers and did not see any about there. I asked Mr. Wildiz for timbers several times and he said that the timbers would be down there, but I never saw any. I asked for timbers in the last shift before Mr. Shields came on the day he was hurt. I wanted to fix up that place where Mr. Shields was hurt. Mr. Wildiz said that timber was not necessary.*

"Q. During the time you were at work there were you ever furnished with any list of *rules* or did you ever see any *rules posted* for the government in the operation of the mine?

"A. No, sir. *I never saw any regular muckers in the mine, nor any timbermen.* When I went on

duty at three o'clock in the afternoon I noticed a large rock in the roof of the tunnel near the breast, *and called the foreman's attention to it.* Mr. Wildiz was the foreman. *That was before four and five o'clock.*

"Q. What did he do and say, if anything?

"A. *Well, he sounded the rock and pronounced it safe.* (*Trans.* pp. 40-41.) *The rock did not look very safe to me."* (*Ibid.*) The witness then describes the location of the rock and condition of the surrounding roof, showing clearly that the indications were such as to excite any sensible man's alarm. The roof was full of cracks or slips and water was seeping through. (*Trans.* pp. 41-42.) Witness further says that *"the blasting I did on the last shift would naturally jar the rock and make it more dangerous."* (*Trans.* p. 42. "I tried to get the rock down but it would not come, and that is the reason why I thought it would probably stay up there." (*Trans.* p. 43.) *"After the seven blasts that I put in had gone off the rock would in my judgment become loosened and more dangerous."* (*Ibid.*)

The foregoing testimony, which is all of the evidence directly bearing on the condition of the tunnel at the time of the accident and during the day preceding it, except that of the plaintiff himself and his partner on his shift, is undisputed in every particular except that the foreman denied that he was asked for timbers. So, we have actual notice brought home to the defendant's foreman, at least six hours before the accident, of the very danger that resulted in the final injury of the plaintiff, with a request for timbers to prevent the accident, which was refused with the statement that they were not needed, and the further statement by the foreman that the rock was

safe. Carlson is corroborated by all of the other witnesses and by what actually occurred afterwards, and is only contradicted by the denial of the man whose criminal carelessness or gross incompetency caused the plaintiff's injuries.

Such was the situation when plaintiff came on his shift at 11 o'clock that night, with his partner Gillis.

Gillis testified that he had never seen any timbers or timber-men in the mine during the month and more that he worked there as a miner before this accident; that there were no muckers to take away the broken rock blasted down by the miners, and no rules given to the men or posted up about the mines. (*Trans.* pp. 47, 48, 49.) Describing the conditions in the tunnel when he and the plaintiff went on duty the night of the accident, Gillis says:

"*There was considerable rock all strewn around where we were, making it hard to get around.* We could not get very well into the breast of the tunnel and do any work comfortably without moving all this blasted rock. I should judge there were three or four car loads of this loose rock on the floor, which had been blasted down possibly the two shifts before we went in. *During the time I was there the workmen were not furnished with any materials for timbering. I asked Mr. Wildiz, the foreman or pit boss, for timbers, and he told me there was no necessity for timbers and when there was he would furnish them. I asked for timbers at a place somewhere previous to this, where we went through a soft slip of ground with some coal scattered through it, and told Mr. Wildiz it was not safe and ought to be secured*

and timbered, and he said he would furnish timbers and put them in there, but no timbers were put in and we went beyond that." (*Trans.* pp. 47-48.) The same witness again says:

"*The condition existing there* (at the point where the accident occurred) *required timbers.* There had been two shifts at work there since our last shift, the one that started at seven in the morning and the one at three in the afternoon. When we went off duty at seven o'clock that morning the roof was in fair condition. There was no immediate danger *but I could see that there was a change of ground coming.* I mean by change of ground that there was ground with rock and more slips coming in. *At seven that morning there might not be any necessity for timbering, but when we came off that shift we had holes in the rock to take down the roof and make it the regulation height. We had an upward and back hole, I believe it was, right around where this roof was bad, and of course I could not say—I did not see what effect our shots had on the roof after that.* That was as I went off the shift. We put two shots in the roof and three or four more shots besides, but I didn't go back to see what the effect was, and had not been back there during the day. The only rules I saw posted up was some rules regarding the bell signals. *I didn't see any rules regulating the duties of employees in the mine and how the work should be done.*" (*Trans.* pp. 48-49.)

The Plaintiff himself, upon the point of defendant's negligence in the several matters involved, testified as follows:

"*I didn't see any timbermen there. I told the boss, John Wildiz, that we ought to have some timbers in there occasionally to take care of that ground, that rock, when it is getting loose, so as to take care of that. From the character of the roof and the rock,*

especially where I was hurt, in the breast of the tunnel, there should be false timbers there all the time. There ought to be a few timbers, emergency timbers, so that a loose rock or any part that is dangerous to work around you can put an emergency prop under it, and it will designate which way it is to be taken down or what is to be done with it. Perhaps it is not to be taken down. *I was never furnished with any timbers while I was at work there. The first shift I went on I asked my foreman, 'Where are the timbers?' He said he didn't know, 'We haven't been using any yet,' and I looked around and said, 'There are some places you certainly ought to be using some.'"* (*Trans.* p. 50.)

The connection and manner in which the foregoing evidence of the plaintiff is quoted on page 17 of the Brief for the Plaintiff in Error, would lead one to suppose that this remark to the foreman was made immediately preceding the plaintiff's going to work on the shift on which he was injured; whereas, it occurred when he went on his first shift in the tunnel, *some two weeks prior to the date of his injuries.* (*Trans.* p. 50.)

Plaintiff further said:

"It was all done in probably twenty seconds, and the second fall, the big rock they tell about, *that big rock should never have fallen upon me. If the ground had been taken care of on the last two shifts it would never have fallen on me. It would have been stopped there on the timbers and I would have been a well man.*" (*Trans.* pp. 52-53.) "On my previous shift I had gone off at seven o'clock that morning and the condition of the roof at that time was not good. *There was always cracks there.* The ground lays in layers; the sand rock lays in layers, fairly good, just

about the average, same way as any other. * * * *I told John (Wildiz), my foreman, that the rock was changing, there was streaks getting into it, black streaks. Of course that meant a change. Had the appearance of softer and black places through those water seams* and the lay of the country which was laying on about forty-five degrees." (*Trans.* p. 53.)

These physical signs of increasing danger from caving, which were thus brought directly to the notice of the foreman, had no more effect in securing better safeguards for the men, than did the actual request and warning that Carlson gave him of the danger from the large rock that afterwards caused the mutilation and maiming of the plaintiff.

Shields further testified:

"*The fact that there was an accumulation of muck or rock at the breast of the tunnel had considerable effect upon my examination of the condition that existed there.* The rock was shot all over and rock and chunks here and there and you had to move it all out of your way. *It leaves you kind of stumbling, but if it was out of the way a man could move safely, generally safer. The shifts prior to mine should have taken care of that ground by timbering, or if the boss ordered them to do so, put up a glory hole and shoot it down, but any way of looking at it it should have been taken care of by timbering. It is the foreman's duty when he hears a complaint from miners that examine the mine to have it repaired.* IF THAT WAS NOT DONE RIGHT ALONG IN OTHER MINES, WHY MINES WOULD BE A SLAUGHTERHOUSE." (*Trans.* p. 54.)

This foreman, JOHN WILDIZ, has not a word to say as to why he kept no muckers and made no effort to have the mucking regularly done; he

makes no explanation of his failure to look after the dangerous conditions described by all of these men who worked daily in the tunnel; he simply denies that anybody ever asked him for timbers, declares that timbers were lying there all the time ready for use; and then completely falsifies his own statements by swearing that *"in ground like that we had in that tunnel it never did need any timbers and never will need any timbers."* (*Trans.* pp. 61-62.)

Yet, the witness Hamilton put up timbers at the very place where plaintiff was hurt, the next morning. (*Trans.* p. 69.)

There were only three other witnesses for the defendant company, but none of them professed to know anything about the tunnel and its condition at the time of the accident, and merely gave their opinions as to what ought to have been done under circumstances of which they were admittedly ignorant. (*Trans.* pp. 65, 67, 68, 63.)

The foregoing state of facts demonstrates a continuous and consistent course of reckless disregard of human life and a stolid indifference to the rights and safety of the men working in this mine that is without a parallel in the reported decisions upon similar unfortunate occurrences. Not only were the well settled rules of general law as to the duty of the defendant company toward plaintiff and its other workmen grossly violated, but the express provisions of the statutes of the State of Washington were totally ignored.

"An Act relating to the proper ventilation and safety of Coal Mines," etc., Approved March 3, 1891, (Laws of Washington, 1891, p. 152, Pierce's Code, Section 6507, Ballinger's Code, Section 3178), provides as follows:

"The owner, agent or operator of any coal mine shall keep a sufficient supply of timber at any such mine where the same is required for use as props, *so that the workmen may at all times be able to secure the said workings from caving in,* and it shall be the duty of the owner, agent or operator to send down into the mine all such props when required, the same to be delivered *at the entrance of the working place."*

Counsel for plaintiff in error seek to avoid the force and application of this law by contending that the allegations in the complaint in this case do not cover the phase of negligence contemplated by the statute. They argue, with apparent seriousness, that the allegations that defendant was negligent for "failure to timber the roof," and "failure to comply with the rules and regulations prescribed by law for the timbering and otherwise prudently conducting the mine," are not supported by the evidence, because the statute says that the company shall "keep a sufficient supply of timber" for use by the workmen. (*Brief*, p. 47.)

It is enough to say, in reply to that contention, that it is neither ingenious nor ingenuous, and is not creditable to the intelligence of counsel nor complimentary to the perceptions of this court.

The same Act of the Legislature (Pierce's Code, Section 6517, Ballinger's Code, Section 3182) requires:

"All owners or operators of coal mines within the State *shall keep posted in a conspicuous place about their mines printed rules, submitted to and approved by the district mining inspector, regulating the duties of persons employed in and about said mines or collieries.*"

No pretense was made that the defendant company ever complied with that law.

But, aside from the statutory regulations above referred to, the rules of the general law of master and servant are so clear and conclusive upon this point that it seems hardly necessary to discuss them here. Opposing counsel have been at pains to cite a great number of cases, to consider at length the admitted conflict and incongruity that prevails in the various jurisdictions on account of the labyrinth of decisions and the almost illimitable variations in the facts of each case decided, and they have formulated and set out in their Brief several abstract propositions of law that are amazing for the hardihood and audacity of the monstrous and murderous doctrines announced.

For instance, on page 36 they calmly ask us to believe that the rule of law requiring a master to exercise ordinary prudence and care, proportioned to the character and risk of the work in which he is engaged, to provide a reasonably safe place for his servants to work, *is entirely abrogated "if the work is of such nature as to constantly cause a change in the character of the place for safety."* Common

sense would suggest that the very rule that requires the master to use a degree of care *proportionate to the nature and dangers of the work* contradicts such a startling creed of cruelty and recklessness. If such a proposition were conceded to be the law, then the mines and factories and other necessarily dangerous industries of the country would indeed become "slaughter houses," as the plaintiff so tragically exclaimed in his testimony.

It is unprofitable and would be an abuse of the patience of the court to indulge, as opposing counsel have done, in a vagrant excursion among the myriad and motley array of decisions that have been delivered in the multitude of fact cases that have been disposed of in the various State and Federal courts. We shall content ourselves with citing a very few of the opinions judicially establishing the principles of law applicable to this case and the reasons on which those principles are founded.

The case of *Peters v. George*, decided by this Court for the Third Circuit, in 1907, (154 Fed. Reporter, 634, 639), was that of a miner injured in a slate quarry by the premature explosion of a blast. The main questions involved were the rule as to distinction between fellow-servants and vice-principals, and the duty of notice and warning to an inexperienced employe; but the Court also laid down very succinctly the law as to the duty of the master in all cases where his workmen are engaged in a hazard-

ous employment, and the idea that the changing conditions of risk incident to the prosecution of the work at all change the rule of law, is not even suggested. The Court said:

"The *general* and *personal duty* imposed by law upon a master, to use reasonable care,—that is, *care proportioned to the exigencies and danger of the situation, to safeguard the place and conditions in which and under which an employe is to work,* certainly required," etc. . . . "In the opinion of Mr. Justice Brewer, delivering the judgment of the Supreme Court in *B. & O. R. R. Co. v .Baugh,* 149 U. S. 368, the whole subject has been instructively discussed, and it has been clearly and logically settled upon what grounds a master may be held liable for injuries incurred by a servant in the course of his employment. The question is always, whether the negligence charged is the *neglect of a primary and absolue duty of the master to the servant.* . . . The master does not insure the safety of the servant, *but he does undertake that the place in which he works, and the appliances with which he works, and the conditions under which he works, shall be reasonably safe-guarded.* . . . *Reasonably efficient supervision of work* of the dangerous kind here described, *must be held to be one of the primary and personal duties of the master.* That there was evidence tending to show that such supervision was lacking here, cannot be denied. *No evidence was adduced on behalf of the defendants, to show either efficient supervision or the establishment and enforcement of rules and regulations adequate to the protection of such employes as the plaintiff.* The plaintiff charges in his statement of claim, that the defendants conducted their business generally in an improper and unsafe manner, and specifically were negligent in "managing, attending to, or removing unexploded charges in their blast holes," and the jury would not be un-

justified in inferring from the evidence that this charge was sustained. Such default in the general management and conduct of so dangerous a business was a default of the defendants."

See also, *Mining Co. v. Jones* (Ninth Circuit), 130 Fed. 812, 819.

The above quoted portion of the Court's opinion in the case cited is almost in the language of the charge to the jury and memorandum decision on motion for new trial of the trial judge in the case at bar, with this striking difference in the facts of the two cases. In the case at bar there was absolutely no effort to deny or to disprove the negligence of the defendant in the several specified particulars set out in the complaint, nor was it attempted by defendant to contest the general allegation of mismanagement, incompetency and recklessness based upon these several failures of duty taken together and upon the failure to provide a safe place for plaintiff to work. On the contrary, as the court below said, the negligence of the company in its general management, supervision and superintendence of the work in the mine was *"admitted by the very manner of the defense."* It was not disputed that no muckers were provided to clear away the broken rock after each shift, nor was it sought to be shown that any rules or orders were given and enforced requiring the miners to do this work, but the plaintiff said the foreman *forbade him to do it;* no timbers were furnished and no timbering done in the tunnel, but the foreman said

"no timbers were ever needed or ever would be needed in the tunnel"; no regular inspection was made by the foreman or other agent of the company, no rules or regulations of any kind were promulgated or enforced for the government of the work and the workers. All these things were admitted or proved by the uncontroverted testimony of the witnesses. As a matter of fact, the record shows that every one of the particular allegations of negligence was established beyond doubt or dispute, and that the jury might reasonably have been directed to find for the plaintiff upon any one of these issues. Much more satisfactorily was the general conclusion of utter want of supervision and proper management established by the concurring proof of the separate acts of failure of duty. The court below, however, wisely and prudently we think, preferred to practically instruct a verdict for the plaintiff upon the issue of general negligence.

There was nothing for the jury to deliberate about or to decide under the testimony upon this point. To have submitted the several questions of defendant's negligence in the various particulars charged and proved, to the jury, would have been simply to invite them to discuss and perhaps to become confused and to disagree in regard to matters of which there was no question requiring serious consideration, and the Court would have been experimenting with the justice of the case and the chances of jury disagreement and error if he had not taken this issue away from the jury entirely.

It is well settled that when a peremptory instruction for a verdict upon any issue is given—which was the effect of the trial court's ruling upon the issue of defendant's negligence—*the only question for this Court to consider is "whether or not the findings of the lower court, considered in the light of the pleadings and all the evidence, was right."*

Modern Woodmen v. Union Nat. Bank, 108 Fed. Rep. 755.

Rollins & Sons v. Board of Com'rs, 80 Fed. 692, 695; 26 C. C. A. 91.

The case of *American Window Glass Co. v. Noe,* (Seventh Circuit), 158 Fed. 780, was the case of a laborer employed to tear down a building, a work that was inherently and increasingly dangerous and in which the risks changed at every step of the proceeding. The Court said:

"In tearing down buildings it would be manifestly unfair to hold an employer to a specific duty to provide his workmen a safe place in which to do the dismantling. (Citing cases). *But the exemption does not excuse the employer's failure to perform his general duty of exercising for his employe's safety the prudence of an ordinary person."*

The work of dismantling buildings, however, is different from that of coal mining in this very vital respect, namely, that the process of tearing down a house or other structure is governed by no set rules or customary methods, but depends entirely upon the exigencies and conditions of each particular case;

whereas, the rules and methods for prudent mining operations are established by long usage, practical experience and the well tested observations of the men engaged in them, and have become so thoroughly and commonly understood that they are largely embodied in the judicial decisions and the statute laws of the country. Mucking, timbering, regular and vigilant inspection and supervision of the progress of the work, and above all things adequate and intelligent rules and regulations for the government of the men and their relations in the prosecution of the enterprise, so as to secure a methodical, prudent and safe system of operations, are among the things that no prudent mine owner or operator can neglect without failing in his absolute and primary duty to his men.

The ever changing and constantly recurring dangers and the new conditions created by the very work itself render this duty an imperative and indispensable one, and no reputable court has ever recognized its abrogation or relaxation, for the reason that to do so would be to license the wholesale mutilation of helpless laborers whose freedom of action is limited by circumstances over which they have no control.

We might easily cite innumerable decisions of this Court and of the Supreme Court, as well as from State courts, in support of the foregoing propositions, but as they trench more or less upon the subject of assumed risks

and contributory negligence, to be hereafter considered, we forbear to do so here. It is enough to say that the holding of the lower court in finding that the defendant company was negligent as a matter of fact and of law, in the light of the testimony and the pleadings, *was right and was one upon which no two fair-minded men could reasonably differ;* and that is the only question for this Court to consider upon that issue.

II.

Assumption of Risks.

There are several incidental questions involved in this branch of the discussion, in view of the pleadings and evidence. In the first place there was such a fundamental contradiction between the contentions maintained by the defendant in denial of the allegations of the complaint, and those asserted in this affirmative defense, that it almost amounts to the complete destruction of the attempted plea of assumed risks. In the testimony adduced by the defendant to controvert the allegations and proof of the plaintiff that the mine was conducted in a negligent and unsafe manner, especially in the matter of failure to timber the roof or to furnish materials for that purpose,—which was the most prominent feature of the negligence alleged and proved,—the whole contention was to the effect that there was no necessity for timbers, that the tunnel was being dug through solid rock, and timbering was not required

by any of the conditions prevailing there. This was positively asserted by the foreman of the mine, and was the theory on which the main defense was founded. But in the first affirmative defense it is alleged that the dangers and conditions causing the plaintiff's injuries were "open, obvious and apparent," and that therefore he assumed the risks of injury from those causes, and the efforts of the defendant's witnesses and counsel at the trial were directed to sustaining that inconsistent theory of the case. Such incongruity of argument and evidence manifestly impairs the force and effect of the defense sought to be interposed to the action, from whatever point of view we may regard it.

In the next place, the court below having ruled as a matter of law, in the light of the pleadings and testimony, that the negligence of the defendant in one of its primary, absolute duties was conclusively established by the evidence, the defense of assumed risks ought not to have been submitted to the jury at all, because nothing is better settled than that a servant does not assume a risk that results from a failure of the master to perform its primary, positive, personal duty towards him, unless he acted with full notice and knowledge of the risk and without the ordinary prudence of a sensible man regardful of his own safety. There was absolutely no testimony that plaintiff in this case acted with such disregard of the dictates of common prudence as would cut him off from the exemption from the doctrine of assumed

risks to which he was entitled under the rule of law just stated. In submitting this affirmative defense to the jury the trial court gave the defendant company an opportunity to escape liability which it was not fairly entitled to claim, and this affords very strong grounds for contending, that taking the record as a whole, the plaintiff in error has nothing to complain of here.

Again, it is the established law of the State of Washington, as declared by the Supreme Court of this State after strong and able debate, that where a mining company fails to timber its mine or to do any of the things positively required by statute, and an injury results to one of its employes as the result of such violation of the law, the defense of assumed risks will not be recognized by the courts. The same thing is held as to what is known as the "factory act," regulating safeguards in mills and factories. *Green v. Western American Co.,* 30 Wash. 87, and *Hall v. West & Slade Mill Co.,* 39 Wash. 447. The court below in this case refused to follow this rule of the State court, and thereby gave to the defendant company another refuge to which it would not have had access under the laws of the State in which it was doing business. The correctness of the rulings of the trial judge upon the above mentioned points is not under review here and now, but we refer to them simply by way of illustrating the utmost fairness to the mining company with which he tried the cause.

In the light of the established doctrine of the decisions of this Court and of the Supreme Court, it cannot be successfully contended that because the plaintiff had worked in the mine some two weeks under conditions of management and supervision which his long experience and knowledge as a miner taught him were unsafe and incompetent, he therefore assumed all of the risks arising from those conditions. If such an argument were admitted to prevail, it proves too much. It would put a premium of immunity upon the conceded negligence of the defendant company, destroy entirely the legal rule of its responsibility and duty, and make the test of its liability depend upon the intelligence and experience of the plaintiff rather than upon its own care, prudence and vigilance in the performance of those functions which by law are imposed upon every master as personal, primary, positive duties towards all servants engaged in his employ. No court can consistently recognize such a proposition, but the very contrary is the effect of all the best authorities.

It should be remembered that the condition of the tunnel at the point where the accident occurred had materially altered for the worse since plaintiff saw it in the morning, sixteen hours before the accident. The roof, which he says was in bad condition and his partner Gillis says was in fair condition that morning when they went off duty, had been subjected to three sets of blasts, considerable progress had been

made in the face of the tunnel and in creating new roof by the two intervening shifts, the big rock that caused all the trouble and which Hamilton and Carlson considered dangerous during the day had been further exposed and loosened by the successive blasts, and the whole situation had been rendered more difficult and dangerous by the failure to timber the roof and to clear away the accumulated rock and dirt blown down by the three shifts prior to the one on which the fall occurred. The foreman Wildiz was in the tunnel at between three and four o'clock that afternoon, by his own admission (*Trans.* p. 62); at that time the miner Carlson called his attention to the big rock and to the condition of the roof near the breast of the tunnel, and asked for timbers to fix it up safely, and Wildiz refused to furnish timbers, said they were not necessary, *examined the rock and pronounced it "safe"* (*Trans.* pp. 41-42). Carlson describes the appearances and indications of danger in the roof at that time, and says they would be enhanced by the blasts fired by his shift as they went off at 11 o'clock. All of these things were visible to the foreman, but he did not go back again until after the accident, and apparently regarded the tunnel as perfectly safe.

Now, we submit that this course of conduct upon the part of defendant's foreman, under the circumstances shown by the testimony, *was equivalent to pronouncing the tunnel as far as it had gone safe and*

complete, and was tantamount to a direct command from him to the miners to go ahead with the work upon his assurance that the roof *already created* was not liable to cave on account of its condition at that point or anywhere near the face of the tunnel where the work was in progress.

When Shields came on at 11 o'clock, he had no means of knowing what had occurred during the day or what changed conditions he might find at the breast of the tunnel, but he had the legal right to assume and to act upon that assumption in entering the tunnel and proceeding to the place of work, that the foreman had done his duty in inspecting the work done during the day, and in safe-guarding the tunnel *as far as created* against any dangers that might have intervened or increased during the time since plaintiff went off that morning. As a matter of fact the foreman had visited the place only a few hours before, and in his judgment found nothing wrong or requiring his attention, although all the other men who saw it thought it was liable to cave any moment.

This state of case brings it clearly within the rules laid down by this Court in the case of *Bunker Hill & Sullivan Mining & C. Co. v. Jones,* 130 Federal Reporter, 813. Indeed, we do not perceive how the two cases can be at all distinguished in principle, and we ask the especial attention of the Court to its own discussion of the law in that decision.

This Court said:

"While it is a ruling principle that a person voluntarily entering upon a contract of hiring assumes all the risks and hazards ordinarily incident to the employment, and liable to arise from the defects that are patent and obvious to a person of his experience and understanding, *it is equally true that risks arising out of the negligence of the master are not those ordinarily incident to the employment, and are not therefore assumed by the servant. Texas, etc. R. R. Co. v. Archibald*, 170 U. S. 665. The risks inherent in work of the kind in which the defendant in error was engaged are well stated in *Kelley v. Mining Co.,* (Mont.) 41 Pac. 273—a case wherein the plaintiff was suing for damages for injuries caused while working as a miner drilling a tunnel. The court said: 'The plaintiff was employed at the time of the accident in running a tunnel in defendant's mine. He was doing this work under the immediate supervision and direction of John Sheehan, the foreman and manager of the mine. Sheehan was not working in the mine with plaintiff. *The plaintiff was not engaged in creating a place on his own judgment and at his own risk. He assumed the risks naturally attendant upon driving the tunnel. It was the duty of the defendant to keep that part of the tunnel or place* ALREADY CREATED, SAFE, *by whatever reasonable means were necessary. If the plaintiff had been injured while in the actual work of drilling or blasting in the face of the tunnel he was driving, he may have had no claim upon the defendant for damages,* for these were risks he assumed as a miner. *But he did not assume the risk of defendant's failure to keep that part of the tunnel or place already created reasonably safe and secure.* For instance, if a stone or material blasted or dug from the tunnel by plaintiff should have been blown against or fallen upon him, he would have had no remedy against the defendant for any injury sustained thereby. This is a risk belonging to his employment and which he assumed.

But he did not, by his employment as a miner in driving the tunnel, assume the risk of the failure of defendant to take such reasonable precautions as were requisite to prevent the caving and falling of the roof of that part of the tunnel already created upon him, while engaged in his work. He assumed the risks of *the work in front of him*, and not the risks of, the failure of the defendant to properly care *for that part of the tunnel or place behind him which he had completed and turned over to the care and control of the defandant.'"*

"In that case the injury occurred," says this Court, *"from the caving of rock behind the plaintiff, and because of accumulation of rock and debris on the floor of the tunnel impeding his escape.* In the present case the evidence on the part of the plaintiff tended to show that the rock fell from a place which was entirely under the control of the master, and which the servant was not bound to inspect. *A defect apparent to one making a careful inspection of a stope in a mine might easily be unseen by a miner attending to his work as directed, and having only the aid of his lantern to light up the walls of the stope or tunnel. It does not appear from the evidence that the defendant in error* (Jones) *could have discovered that the roof of the stope was in danger of caving, without a particular inspection thereof*, or that the timbering was insufficient to secure the loose rock above. *It was not his duty to timber the mine, or to pay any attention to that work, unless it was obviously defective, in his understanding, in the immediate vicinity of his work. That duty belonged exclusively to the defendant."* (130 Fed. 818-819.)

It is difficult to imagine a state of facts more similar to those in the case at bar than are the material facts discussed in the above quoted opinions, so far as the principles and rules of the law of assumed risks are concerned. In this case *the part of*

the tunnel or place already created and passed upon by the direct judgment of the foreman, was the very place that caved and fell upon the plaintiff. All of the witnesses say that at the time of the accident this big rock that fell down was from three and a half to four and a half feet from the breast of the tunnel, that it had been visible all day, that attempts had been made to pry it down, and it was seen to be so situated as to be increasingly dangerous as the work progressed and the blasts tended to jar and loosen it, and all of defendant's witnesses were very emphatic in their testimony that these blasts would have a cumulative tendency to jar loose the roof and walls as far back as fifteen and twenty feet. For the purposes of inspection and safe-guarding places *already created,* it is immaterial whether the dangerous part of the roof was four feet or forty feet from the breast of the tunnel.

The portion of the roof that fell upon plaintiff was a *place already created, passed upon, and pronounced safe by the defendant's foreman,* and nothing but the most careful inspection by the plaintiff, when he came on duty at 11 o'clock that night, could have disclosed to him that the danger of this completed part of the roof falling upon him was so great as to preclude his working there with any degree of prudence for his own safety. He came on with nothing to aid him but the light of his lantern; Gillis, who had preceded him a few minutes, at once called his attention to the roof as not looking safe; he replied

that they must examine it and said he would go for the hammer, which he supposed was out at the entrance to the tunnel; he explains that the character of the rock in the roof was such that the only reliable test of its condition was to tap it with some heavy instrument like a sledge hammer, so as to detect if it was hollow or loose; he says that if he had discovered that the roof was so unsafe as to make it too dangerous to proceed with the work, *he would have reported it to the foreman and quit work until something was done to remedy the defects, but he had no time to make an inspection or to find out what the conditions actually were.* (*Trans.* pp. 51-52; 45-47.) When he hung up his lamp and started to go after the hammer in response to the remark of Gillis about the looks of the roof, Gillis told him that the hammer was over there by him (Gillis), on the other side of the tunnel, and plaintiff took *one or two steps towards it,* when the fall of rock began. (*Trans.* pp. 47, 52.) He describes exactly how he acted that night in approaching the place where he was to go to work; that he followed the unwritten custom among miners entering an untimbered tunnel to keep next to the walls or "pillars" of the tunnel, as being always safer than the middle; that he had to feel his way along and was stooping and stumbling on account of the muck or broken rock that defendant's foreman had failed to clear away from the work of the two preceding shifts. To quote his own language:

"I was intending to take the hammer and examine the rock carefully and if I had found it in unsafe condition to work under, *I would have reported it to the boss or sent my partner to notify the boss that there was a big piece of ground that should be either timbered or taken down at his orders.* I went to the face of the tunnel and hung my light to it and stepped back and on the side *about four feet from the face of the tunnel,* and just as I was going to go over towards Jack (Gillis) the rock hit me on the shoulder and twisted me around with my face towards the face of the tunnel. *The rock fell from the center of the roof. It was not from the edge of the roof, because I was edging pretty close myself and it fell just as I was going over towards him in that stooping position.* Gillis was on the right hand side of the tunnel and I was on the left hand side. *I wanted the hammer to sound the rock.* That is customary, to take it and stand around in the safest place to get and reach it with the hammer and sound it; and if it sounds solid you are supposed to be safe, and then you advance from there and sound the other and keep yourself on safe ground. You pass on your own judgment. If it sounds right to you you advance further and sound the ground further on, and if you find some ground that is not safe, that you know by the sound of the hammer is not right, *you take other ways to prove it.* You get a long bar and reach over, and if you see a crack in some place you try and pry it down. The condition of this rock led me to feel that I wanted to test it. The roof did not look good to me that night. I saw that there was a change had taken place there during my absence of sixteen hours and the other shifts working there, and there was a general change took place and I noticed it, *but had not time to take care of it or do anything with it.* (*Tr.* p. 56-57.) If I had gotten my hammer against the rock and discovered that it was loose I would have gone out or sent my partner out and notified the boss; *I would have stopped right there.* * * * *I didn't have*

time to examine it but I saw that a change had taken place. I was going to examine it but got caught before I had time to examine it. (*Tr.* pp. 58-59.)

Again, he testified:

"THE ROCK FELL BEHIND ME. *The place where I was struck was about four or four and a half feet from the face, perhaps five,* I don't know exactly, *but I was trapped right with my head towards the face of the rock.* (*Trans.* p. 54.)

"The rock that I was going to test is part of the rock that fell on me, but the rest of the ground around there is kind of ticklish too. It was not that rock that knocked me down first. It was another shell of rock adjoining it. It was not twenty seconds or half a minute between the two falls of rock." (*Trans.* p. 53.)

The testimony of Gillis upon this point is to the same effect in every essential particular. (*Trans.* pp. 44-47.)

Under the foregoing undisputed evidence, the authority of the Jones case above cited seems conclusive. But, in addition, we call attention to the following leading decisions to the same effect.

Highland Boy Gold Mining Co. v. Pouch, 124 Fed. 148, 151.

C. O. & G. R. Co. v. McDade, 191 U. S. 68.

In the McDade case, *supra,* the Supreme Court lays down the rule that the true test of the servant's duty and responsibility under the law of assumed risks is not that he must have used care to discover the dangers which he is alleged to have assumed,

"but whether the defect is known or plainly observable by the employee." It cannot fairly be contended that the plaintiff in this case knew of the danger from the defective roof, or that it was so plainly observable to him when he entered the place of work, by the dim light of his lantern, that he knowingly remained there and undertook to examine it at his peril. Two shifts of men had worked under it all day, the foreman himself had examined and pronounced it safe only a few hours before, and it is not reasonable to suppose that this plaintiff could, in five minutes, and under the difficulties that confronted him in a dimly lighted tunnel and with broken rock impeding his every step, learn the dangerous condition of a roof that he had not seen for sixteen hours, during which a *new place of work had been created for him.*

The charge of the Court submitted this issue of assumed risks to the jury as favorably as the defendant company could expect or ask. (*Trans.* 82-83.) The verdict being for the plaintiff upon that issue, there is no rule of law or practice that would warrant the trial court or this Court in setting aside the verdict and judgment, for any reason that appears in this Record.

III.

Contributory Negligence.

In the foregoing portions of this Brief we have practically discussed very many if not all of the material facts and propositions of law that are involved

in this branch of the case. It being assumed, as it must be for the purposes of this part of the argument, that defendant's negligence is established as a matter of law, and that plaintiff was not injured by any risk that he can be said to have assumed as part of his employment, in what respect can it be contended reasonably that plaintiff contributed to his own injury by any act or omission of duty? In a recent interesting case, the Supreme Court has instructively discussed the shadowy and speculative distinction that sometimes exists between assumed risks and contributory negligence, or is sought to be made for the purpose of obscuring the law and defeating the just liabilities of employers. *Schlemmer v. B. R. & P. R. Co.,* 205 U. S. 1, 12-13. But it is not necessary in this case to elaborate or to modify the plain definition of negligence given by the Supreme Court in the case of *Baltimore, etc., Railway Co. v. Jones,* 95 U. S. 439:

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done."

Tried by that test, what did the plaintiff do, or fail to do, at the time and place of his injuries, that a reasonable and prudent person would not have done, or would have done, that proximately contributed to his injury as complained of here?

It is argued by the counsel for the plaintiff in error that he failed to use the usual and proper precautions in vogue among miners, in not feeling his

way ahead of him and sounding and testing the walls and roof as he walked along the tunnel towards the breast of it where he was to work. (*Trans.* pp. 61-62, 64, 66, 67.) That view of the case was supported by the testimony of the witnesses for the defendant, *speaking purely as experts and not with reference to actual conditions in this mine.* Such a view of the situation is entirely incompatible with the whole theory of the defense, which was and is that the tunnel was through solid rock, required no inspection, timbering, or any other safe-guard usual in such mines; and it is overthrown by the fact that the foreman of the mine himself was in the tunnel at four o'clock the same afternoon, examined the roof and pronounced it safe, and, moreover, swore that the tunnel never had needed and never would need any timbering. If these contentions of the defense were true, then the course of procedure which it is said plaintiff should have pursued would have been a most foolish and unnecessary consumption of time and labor. It is claimed throughout counsel's Brief that the plaintiff was a more capable and experienced miner than any of the other men in the mine, including the foreman. Certainly, then, his judgment and conduct must be fairly deemed to have been dictated by reasonable regard for his own safety; and he tells us just how he acted, going directly to his place of work, for the reason that the law entitled him to assume and to govern his movements upon the assumption that his master had done what should be done towards safe-guarding the place where he was to work, and *all parts and places in the tunnel that had already been created and submitted to the master's control*

and care, as this part of the roof had been several hours before. He went along the side of the tunnel, next to the walls, as being the safest place to walk in any untimbered tunnel; when he came to the face of the tunnel his attention was called to the dangerous indications *in the roof overhead, some four or five feet back from the face,* and he immediately got ready to make an inspection and test by the usual methods known to and approved by his experience, but before he could make a single observation or even reach the instrument with which the examination was to be made, *the roof behind him caved in* and fell upon him. *He was not standing under the rocks that fell,* except in so far as the narrowness of the tunnel and the condition of the floor, cumbered as it was with broken rock and debris left there by the negligence of the defendant, compelled him to stand, but he says *he was "edging pretty close" to the wall when the rock began to fall;* the whole catastrophe occurred in less than five minutes, and he had not struck a blow nor made a movement that in any way caused or contributed to bring down the shower of rock upon him. He had not been there for sixteen hours before, knew nothing of the observations and developments that had transpired and alarmed the other miners during the day, but which the foreman refused to notice or to remedy, and he came to his work with no more knowledge of existing conditions than he might surmise from his general knowledge of the mine and its management. The law did not

require him to surmise anything, but to rely upon his master's doing its duty.

But, conceding that there was some testimony that plaintiff did not pursue the most prudent and usual course of examination and inspection upon approaching the face of the tunnel, that question was submitted to the jury by the court, with a very plain and positive instruction *that if they should believe that the plaintiff did not pursue the course described by the defendant's own witnesses, then they must return a verdict for the defendant company.* (*Trans.* pp. 81-82.)

Surely, no more favorable instruction could have been given without doing violence to all of the testimony, and we think that the plaintiff rather than the defendant has a right to complain of this action of the court.

So, too, the other portions of the charge, instructing the jury upon the general rules of the law of contributory negligence, are perfectly fair and cover all material phases of the evidence. (*Trans.* 80-81.)

An argument is sought to be advanced in the opposing Brief, that plaintiff chose the more dangerous of two alternative modes of testing the roof, and therefore is not entitled to recover. This aspect of the question is not supported by any of the testimony, and even if it was, the above mentioned instruction of the court, holding the plaintiff guilty of

contributory negligence if he pursued any but the course indicated by the defendant's witnesses, completely meets the argument. Moreover, it was the negligence of the defendant that rendered it necessary for the plaintiff to make this dangerous selection of methods, in a dark tunnel, under the most difficult conditions arising from the impediments existing there, and with no such knowledge of the real situation and its dangers as the defendant had possessed for several hours before the accident. The plaintiff cannot be held responsible for an error in the selection of methods in an emergency created by the negligence of the defendant itself.

IV.

Negligence of Fellow-Servant.

As before stated, this plea cannot be urged in defense of defendant's liability, and we are surprised that it should have been incorporated in the Brief of counsel. It was not pleaded as an affirmative defense in the answer, and under the well settled rules of pleading in the courts of the State of Washington, which will be enforced in the Federal Courts, it cannot be relied upon at the trial or afterwards. The trial court very promptly ruled to that effect, when the effort was made to introduce the fellow-servant doctrine in the last desperate stages of the defendant's case below. But we suppose the force of habit and association has led to its being urged

here, as the customary companion of assumption of risks and contributory negligence in the stereotyped defense to actions of this kind.

It may well be doubted whether there is always wisdom in a multitude of counsel, but it is demonstrated in this case that there is a diverting versatility in the efforts of several lawyers to support a weak cause. When this case was tried below and an ineffectual attempt was made to invoke the defense of fellow-servant in the absence of its being pleaded, the particular fact upon which it was sought to base the plea was the failure of plaintiff's partner on the shift, the witness Gillis, to communicate to plaintiff the warning which the witness Carlson gave to Gillis as the two shifts changed at 11 o'clock. But thanks to the fertility and variety of resources of the agile array of counsel, we are now told that it was the negligence of the foreman, John Wildiz, that is to be considered as defeating our right of action. In any view of the case and upon either of these shifting grounds of defense, there is absolutely nothing in the position that a fellow-servant's negligence has the slightest bearing upon the controversy in this cause. Nothing is better established, in the law of the Federal Courts at least, than that a foreman is not a fellow-servant with the workmen under him, in respect to those duties that are considered the primary, personal, absolute duties of the master, among which is the duty to provide a safe place for the employees to work.

Peters v. George, 154 Fed. R. 638, 639; *Mining Co. v. Jones,* 130 Fed. R. 819; *B. & O. R. R. Co. v. Baugh,* 149 U. S. 368.

In the light of what has been already said in the foregoing pages, and the rules laid down by the authorities cited, we do not deem it necessary to discuss the several instructions to the jury asked by the defendant and refused by the court below, and which refusal is assigned as error. They were predicated upon a false theory of the case, not supported by any testimony that was before the jury, and would have given the jury an erroneous view of the law of the case.

We confidently assert that there is no error in the Record for which the judgment of the court below should be disturbed.

Respectfully submitted,

DUDLEY G. WOOTEN, of
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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE TREMONT COAL & COKE COMPANY,
Plaintiff in Error,
vs.
PATRICK J. SHIELDS,
Defendant in Error.

No. 1639

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Reply Brief of Plaintiff in Error

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The Ivy Press, Second and Cherry, Seattle

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Defendant's Negligence.

Counsel for defendant in error in their brief have injected into their argument, as they did into the testimony at the trial, evidence of the alleged negligence of defendant which was not and could not be actionable negligence in this case, assuming it to be negligence at all. They say it was negligence in defendant not to have a crew of timbermen in that mine, when the undisputed testimony shows that the tunnel ran through solid sandstone rock; that at only two places in the entire length of the tunnel of one

hundred and sixty feet had there ever been any necessity for timbers, and yet they claim in their brief, with all the sweeping, dogmatic statements, of which they are so peculiarly capable, that it was "murderous recklessness, without parallel in the reported cases," etc., etc. At the rate the testimony says the tunnel progressed, it took over six months to drive that tunnel to the point in question, and counsel would have a crew of timbermen stand around for six months drawing their salary with nothing, except two very short jobs of timbering, to do. Counsel does not say how many timbermen should be in the "crew," but presumably it would take more than one to make a "crew." To sustain this ridiculous position, counsel cite Sec. 3178 Bal. Code, from whence they get their inspiration.

It is as follows:

"The owner, agent or operator of any coal mine shall keep a sufficient supply of timber at any such mine *where the same is required for use as props,*" etc.

Does that statute require a crew of timbermen? Does that statute require timber to be furnished at *every mine and under all circumstances?* or only *"where the same is required for use as props?"* The statute is not so ridiculous as counsel seek to make it. The reasonable interpretation of that statute and

the common law is that timber should be furnished *when and where needed.* That is all. No one claims that that tunnel ever needed any timber outside of the two spots in question.

Now what is the testimony concerning *when* and *where* timbers should be used? Plaintiff testified that:

"I was intending to take the hammer and examine the rock carefully and if I found it in an unsafe condition to work under I would have reported to the boss or sent my partner to notify the boss that there was a big piece of ground that should be either timbered or taken down at his orders."

Also the following:

"If the place is dangerous the miner has no right to be there, and if he makes up his mind it is not a safe place to be he should not work under it, but should notify his superior."

Also the following:

"It is the foreman's duty when he hears a complaint from miners that examine the mine to have it repaired." (T. of R., p. 54.)

R. B. Hamilton, plaintiff's witness, testified:

"If a miner sees a place in the mine he thinks ought to be timbered, he should go to Mr. Widitz (foreman), and it would be Mr. Widitz's duty either to furnish timbers and instruct the miners to timber it up or to furnish timbermen to do it." (T. of R., p. 36.)

All other witnesses who testified on the subject testified in the same way—that it was the miner's duty to examine the mine and if he thought at any time that timbers were needed he should notify the boss, whose duty it would be to see that they were furnished *if needed.*

That testimony completely disposes of counsel's ridiculous and extravagant claims that defendant in error was obliged to furnish an ever-present "timber crew" or the requirement of timbers being furnished *when not called for or needed.*

The charge that defendant did not post notices, about which so much was made at the trial and in this brief, is not shown to have been the proximate cause of the injury or pertinent in any way, except for the technical fact that the state law requires it to be done. A man may run a mine much more carefully and not post notices than another who covers the premises with notices as the law directs. No attempt was made by the plaintiff in error to show what direction those notices could have given those miners that they did not have or how the fact was pertinent in any way, except the technical statutory requirement.

The only charge of negligence that can possibly be considered as helping to cause the injury is the failure to furnish timber.

Now let us see whether under the testimony there was any default on defendant's part as to that charge of negligence. As above shown, the duty of defendant was to furnish timbers when asked for by the miners, if, upon examination by the foreman, they were needed. The condition of the roof on the shift on which plaintiff was injured had not been examined by the miners to see whether it needed timbers. It was during the process of examination that the roof fell, so there was no request of defendant for timber as to that situation, so that there could not be negligence of defendant in error for what happened there, as no report had been made to the foreman requesting timbers which make it the duty of defendant to immediately examine and, if found necessary, to furnish them. But counsel say that on the next previous shift defendant was asked for timbers, and Widitz examined the rock and declined to furnish them, saying the roof was safe, so they didn't need them. This testimony is disputed by Widitz, but assuming it to be true, what does it prove? Simply that at *that time* and in *that condition* it appeared to be safe so it did not need timbers. Was Widitz right in his judgment at that time?

The plaintiff's witness Carlson says:

"The rock might have fallen in my shift, but, to the best of my judgment, I did not think it would.

If I had believed it would, I would have timbered it." (T. of R., p. 42.) "I tried to get the rock down, but it would not come, and that is the reason why I thought it would stay up there." (T. of R. 43.)

So Mr. Carlson evidently thought it was reasonably safe, at least at that time. *The facts show that his judgment was right, as the rock did not fall during his shift.*

Now what happened? At the close of Carlson's shift *seven blasts were exploded,* which naturally "loosened the rock so it became more dangerous." "The blasting that I did on the last shift would naturally jar the rock and make it more dangerous." (Carlson's testimony, T. of R., pp. 42-43.)

This changed the condition entirely. Rock which was safe by the fact that Carlson could not get it down, and it did not come down during his shift, was jarred loose, broken and became more dangerous. This new condition required another examination by the miners, and if found dangerous a report to the foreman to the effect that it was dangerous would have made it the foreman's duty to *again examine the rock and see what it needed. Until that duty was imposed there could not be a failure to perform the duty or negligence predicated for failure so to do.* It was not the duty of the *foreman* to examine the

mine at the beginning of each shift, but was the *miner's* duty. All of the witnesses, including plaintiff, testify to that.

Now in what respect was defendant negligent with reference to timbering on the night of the accident? The condition was new. It changed with every blast. The miners had not made their examination so as to report to the foreman. The duty rested with the miner and he had not completed his duty when the rock fell. Furthermore, to timber that roof at the time Carlson says he asked for timber would not have been practicable.

Hamilton, plaintiff's witness, says:

"It is possible to put in timbers right up to the breast, but in blasting hard ground, as this was, it is preferable to keep your timbers back at least *four or five feet from the breast.* You keep your timbers up just to keep your ground safe. If you can keep them back twenty feet we would rather do it, because then our shots are not cutting our timbers to pieces. If you put the timbers closer than twenty feet they are liable to cut them sometimes." (T. of R., p. 38.)

This was the only testimony on the subject.

The rock in question was not "four or five" feet from the face of the tunnel but two and one-half to three feet, according to Carlson, witness for plaintiff, who worked on the shift next prior to plaintiff.

We contend, in the light of the testimony of this case as above shown, that the court's charge to the jury, by which he held the defendant guilty as a matter of law "by reason of *neglect* to *supervise* the work of *employees and to constantly inspect* the mine so as to *know as often as the shifts were changed the condition there,*" etc., was error. The undisputed testimony by all the witnesses, including plaintiff, all of whom were experts, that it was not the duty of the foreman to inspect the mine first after the shots were fired but *was the duty of the miners.* As to defendant's inspection of the mine during the shifts each day, the only testimony in the case was that of Mr. Widitz himself:

"I was last in that tunnel between three or four of the same afternoon of the day on which Mr. Shields was hurt, and went clear through the tunnel to the breast where the work was going on, as it was my business to do." (T. of R. 62-3.)

That is the only testimony on the subject. No witness testified that the foreman did not make regular trips through the tunnel and supervise the work. On such a showing we submit, the court was not warranted in so charging the jury, and for that reason alone the judgment should be reversed.

Assumption of Risk.

The only other branch of the case to which we wish to reply is to the brief of opposing counsel to the proposition contained on page 36 of our original brief, as follows:

"When the work which a servant is employed to do consists in making a dangerous place safe, or when the performance of his work constantly causes a change in the character of the place for safety, the rule requiring the master to furnish a reasonably safe place in which the servant may perform his work does not apply, but in such case the servant assumes the risk of the dangerous place, and of the increased danger caused by his work."

To this proposition we cited in our original brief the following cases:

Finlayson vs. Utica M. & M. Co., 67 Fed. 507;

Armour vs. Hahn, 111 U. S. 313;

Minneapolis vs. Lindin, 58 Fed. 525;

Ry. vs. Jackson, 65 Fed. 48;

Col. F. & I. Co. vs. Lamb, 40 Pac. 251;

Kellyville Coal Co. vs. Brizas, 79 N. E. 309;

Russell Creek Coal Co. vs. Willis, 31 S. E. 614;

Cushman vs. Carbondale Fuel Co., 88 N. W. Rep. 817;

Island Coal Co. vs. Greenwood, 50 N. E. 36.

The cases all sustain the doctrine, and some of them are almost identical in the facts to the case at bar.

Counsel for defendant in error, with more than their customary wisdom, as shown by the balance of the brief, absolutely refrained from attempting to distinguish any of these cases or to show in any manner that they are not applicable to the facts of this case. Instead of attempting it, counsel cite the case of *Peters vs. George*, 154 Fed. 634-639.

In that case the plaintiff was a common laborer in a slate mine. He was set to work to drill out a blast that had not been exploded, which was conceded to be very dangerous business, without instruction as to the danger. It was held that the master was liable for not instructing him of the danger. What have the facts of that case to do with the case at bar? How are they at all similar? The case has no bearing upon the facts or the legal principles involved in this case.

The next case cited is the case of *American Window Glass Co. vs. Noe,* 158 Fed. 780. This was a case where plaintiff was engaged in tearing down a building. While performing the work he was *specifically directed by the superintendent to do certain*

work, in the doing of which he was injured. It was held, that plaintiff did not assume the risk of the negligence of the superintendent *in ordering him into a dangerous position* which caused his injury. The master was held negligent by *his specific order* which placed plaintiff in the dangerous position in which he was injured.

How does this case apply to the case at bar? Neither its facts nor the legal principles involved have any bearing on this case.

Before proceeding farther let us state our position together with the testimony which we claim bears upon it.

The proximate cause of plaintiff's injury was the falling of loose rock from the roof of the tunnel in which he was working as a rock miner. There were three shifts during the day, from 7 A. M. to 3 P. M., from 3 P. M. to 11 P. M., and from 11 P. M. to 7 A. M. Plaintiff worked in the shift from 11 P. M. to 7 A. M. The rock which fell and injured the plaintiff was located in the roof of the tunnel near the center about two and a half to three feet from the face of the tunnel, as described by plaintiff's witness, Carlson, who worked on the next preceding shift. Other witnesses put it from three and a half

to four feet from the face. The last work each shift did was to fire the shots in the drill holes that they had made during the shift. They put in the powder, lighted the fuse, and left the mine. The explosions of the heavy blasts which followed broke out the rock in the face of the tunnel, and also jarred loose and broke down rock in the roof and sides of the tunnel. *At the beginning of each successive shift, the condition of the tunnel was changed* by having the floor covered with broken rock from the blasts on the face of the tunnel and the falling rock from the sides and the roof, and by having the roof and sides changed by the terrific explosions which often jarred and broke the rock of the roof of the tunnel, causing it to loosen and sometimes fall down. It was the rock in the roof of the tunnel *that had been jarred loose by the previous blasts* that fell upon plaintiff and caused the injury. Who was at fault for the rock so falling on plaintiff? In order to determine this question, it must first be determined whose duty it was *to inspect the roof of the tunnel and take down the loose rock* therefrom and to make it safe, in other words, to make it a *tunnel* fit for the purposes intended. Here is the testimony:

R. B. Hamilton, witness for plaintiff:

Q. Whose duty is it in the mine to investigate the condition of the roof and the walls with reference to the necessity for timber?

A. *It is the duty of the foreman and also the duty of the men working there.* If the *miner sees a place* in the mine *he thinks ought to be timbered* he should go to Mr. Widitz, and it would be Mr. Widitz's duty either to furnish timbers and instruct the miners to timber it up, or furnish timber men to do it. (T. of R., p. 36.)

Again: "Where a tunnel is being driven through the rock, the rock miners have to drill holes and put in their shots, *and if there be any loose rock in the breast or roof or any place around, usually his duties are to sound it and pick down what is loose, and whenever it is practicable to get the loose rock down, that is really the thing to do.*" (T. of R., p. 37.)

Louis Carlson, witness for plaintiff:

"It is the duty of muckers to clear away the rock and blasting in the face of the tunnel, but not his duty to take the rock from the roof of the tunnel or walls or face. It is the duty of the timberman to do the timbering whenever the foreman tells him to, but not the timberman's duty to take rock out of the roof. *It is the miners' duty to get the rock out of the roof, and out of the face of the tunnel, and out of the wall.*" (T. of R., p. 42.)

Patrick Shields, the plaintiff:

"A mucker is not bound to go and muck unless the ground is examined ahead of him, *but the miner makes his own examination and finds if the ground*

is bad. The mucker works under the miner. The miner tells him where to clean the rock out, and if it is dangerous tells him to keep out and wait until it is fixed." (T. of R., p. 59.)

"The blasts in the face of the tunnel make what we call an overbreak; that is the vibration and concussion of the shock may shake it back quite a ways. The shots that are put in at the end of every shift necessarily change the condition of the tunnel immediately back of the face, and if they are deep shots they will make a greater change, and when a man goes back in the tunnel after one of the shifts comes off he naturally expects to find a new condition at the face, and when the ground begins to get bad over a man's head he ought to have it taken care of by reporting to the boss or laying off work until it is repaired or something done." (T. of R., p. 55.)

"If the place is dangerous, the miner has no right to be there; and if he makes up his mind it is not a safe place to be, he should not work under it but should notify his superior. * * * I was intending to take the hammer and examine the rock carefully; and if I had found it in an unsafe condition to work under and would have reported to the boss or sent my partner to notify the boss that there was a big piece of ground that should be either timbered or taken down at his orders. * * I wanted the hammer to sound the rock. That is customary, to take it and stand around in the safest place to get and reach it with the hammer and sound it; and if it sounds solid you are supposed to be safe, and then you advance from there and sound the other and keep yourself on safe ground. You pass on your own judgment. It it sounds right to you you advance further and sound the ground further on; and if you find some ground that is not safe, that you know by the

sound of the hammer is not right, you take other ways to prove it. You get a long bar and reach over, and if you see a crack some place you try and pry it down." (T. of R., pp. 56 and 57.)

Also: "It is the foreman's duty when he hears a complaint from the miners that examine the mine to have it repaired." (T. of R., p. 54.)

Also: "This testing of rock is something I have to do right along in rock mining. A man is always looking out for his head. If I had orders to take that rock down I would try my bar on it; and if it didn't come down and was dangerous to stand under and drill it, I would put in small timber consisting of a post and cap under it and commence to drill and as soon as you light the fuse you knock your false cap out and it comes down." (T. of R., p. 58.)

John Widitz, defendant's witness:

"In driving a tunnel such as this one by blasting we must expect that some rock or rocks will be jarred loose, and when the shot goes off that leaves loose rock. *A man has to go there with a pick or certain tools and pull that down and examine as he goes. If a miner knows anything about mining he will take a pick or certain tools* so that he can reach ahead of *him as he goes and examine the roof and sides a certain distance from the place where the charge is located.* Of course every miner will expect that something may be loose and not safe for him to go in unless he examines the place or falls; and as he goes

with the pick he can rap and tell what is loose and what is solid. The miner should not go right into the face without making preliminary tests as he proceeds, because they are not safe for there may be something hanging down that wants to be taken down or secured before going too far, and by going straight in he takes chances certainly, not knowing what may be ahead of him." (T. of R., p. 62.)

Ellis Roberts, defendant's witness:

"If I was blasting rock in a tunnel I never go in there until the smoke is cleaned out, and generally take my pick with me and examine the ground as I advance as carefully as I can. I take my pick and tap the roof all around to see if it is solid or if there has been any shake around there from the shot which I left, and advance that way until I reach the face." (T. of R., p. 64.)

Q. What have you to say of the action of a man going clear into the face of the tunnel without making any preliminary test—going in right after the blast has been discharged?

A. Well, that is something I didn't do.

Q. Why?

A. Because I understand that in this tunnel there were three shifts, and it is always a very good act for a man to be very careful after another shift because he don't know exactly how it was left there. I would never go up to the face without a thorough examination first back of it. (T. of R., p. 64.)

"The last thing a miner does before leaving the face of the tunnel at the end of their shift is to light their shot, *and that will cause the condition to change.*" (T. of R., p. 65.)

Romanio Marquette, defendant's witness:

"After a shift has just come off when I go into the mine, before I go into the face, I will take the pick and look around and see if there is any loose rock around in the top and try to get them down. If I can't get them down with the pick, if I see it is loose and dangerous for me to work under it, I try to take it down, and if I can do nothing else I put up a little shot and get it down. I put powder in and get it down. *I have to make this examination in order to see if the place is a safe place to work in.* The last thing a shift does when it leaves a rock tunnel, *it generally shoots a half hour before quitting time.* The men following are the first to go in after the shot is fired, and if you shoot a heavy shot *maybe the ground would be loosened behind in the top ten or fifteen and maybe sometimes twenty-five feet.* When a miner goes into a tunnel after a shot has been fired, *it is his duty to take a pick and look in the roof first and pick the loose rock down.*" (T. of R., p. 66.)

George Morris, defendant's witness:

"It is the duty of a rock miner if he goes into the face of the work after a blast has been discharged by the previous shifts, he secures his way in and sounds the roof with his pick very carefully and cautiously and would not go clear into the face first, but he will examine his way in; all practical miners will. If there has been a round of holes fired it is necessary for miners to be very cautious in going into their work. I mean by round of holes a round of blasts, including the shift's work. He should use a rock pick. It is the proper tool to use in sounding rock, by all miners. A pick has the sound to sound the rock, which the hammer has not. The hammer is not the proper article to sound the rock with according to my experience in rock mining. The pick is held

in the hand and you examine it as if you were going to pull the rock, and you would sound it here and there and work your way in, sounding it as you go. If after making these tests you discover that there is a loose rock there you take these loose pieces down, unless there is a body of heavy ground. If the ground was bad or loose it would have a bad sound, but if it was solid the pick would bound off of it. There is a difference to a practical miner in picking in heavy ground and loose rock. An experienced miner can tell from the appearance of the rock whether it is loose." (T. of R., pp. 67 and 68.)

All of the witnesses above quoted were rock miners of many years' experience. Everyone except Mr. Gillis, one of plaintiff's witnesses, who did not testify on the subject, testified directly that it was the duty of a rock miner to test the rock and examine the tunnel carefully after every blast, to remove the loose rock and make the tunnel safe; that if it is found that the miner is *uncertain whether it needed timbers or ought to have the rock taken down, he reported to his superior;* that the employee unquestionably assumed all ordinary risks in the exercise of his duties. The examination and care of the tunnel, including the roof, was one of the ordinary duties of the plaintiff, as a rock miner. In performing that duty he assumed all risks and cannot recover in this action. If there was any negligence which contributed to the injury, it was his own. The loose rock on the floor of the tunnel, caused by the blasts sent off by the preceding

shift is not negligence, as plaintiff under his duties was the first man who should enter that tunnel. The man whose duty it was to remove the rock was the mucker, but plaintiff himself testified that a mucker is not obliged to go in until the rock miner has made the examination of the rock. A miner always has the rock on the floor of the tunnel to contend with, and it is therefore not negligence that the rock was there. As to the timbers, the undisputed testimony of every witness was that the condition changed with every shift; that the terrific explosions loosen the rock in the roof of the mine and elsewhere, scattering sometimes as far back as fifteen and even twenty-five feet. This state of facts brings the case squarely within the rule we contend for on page 36 of our principal brief.

The cases cited under that proposition in our principal brief control this case. There is no distinction to be made in principle. In fact, several of the cases are on all fours with this case. Counsel for defendant in error, seek to evade this proposition and to distort this case so as to get it within the facts of the case of *Bunker Hill and Sullivan Mining and C. Company vs. Jones*, 130 Fed. Rep. 813. The cases are not at all similar in their facts or in the principles of law involved. The plaintiff in that case was called a

"machine man" who was a man who ran an air-drill. The rock which fell on him and caused the injury came from part of the roof of the tunnel where no timbers had been placed. It was no part of his duty to either examine the roof of the tunnel or any other part of it or to make it safe or to timber it. The following is taken from the statement of facts:

"After the accident, the witness went up to the next floor and found that ore had been worked back too far before timbers had been put in; that it was peculiarly dangerous, from the fact that there were no stulls or sprags running from the timbers up to hold the ground in case it should slough off or become air-slaked; that there should have been a sprag or a short stull put up from the timbers to the ground; to steady and support it. It was the duty of the shift boss to see that it was done. *It was no part of the duty of the machine men to see whether it was done or not.*"

Q. In order to do that work in a proper way, should this ground up here have been inspected before a man was put in there?

A. *It should have been; yes sir.*

Q. *Whose duty was it to do that?*

A. *It was the shift boss' duty.*" (pp. 815 and 816 of opinion.)

On this point the following instruction was upheld:

"And if you find from the evidence in this case that the defendant knew that the ground was loose and liable to cave at or near the point described by

the evidence, or by a reasonable inspection could know, and you further find that the plaintiff could not know and *it was no part of the plaintiff's duty to make an inspection for the purpose of ascertaining the condition of the same place* and you further find that the plaintiff was set to work and while so working, rocks came down from the upper chamber above the plaintiff, and he was thereby injured, then I instruct you that your verdict must be for the plaintiff."

Also the following:

"The master is not required to be present at the working place at all times, in person or by representative, to protect a laborer from the negligence of his fellow servant, or from his own negligence in the constantly changing conditions of the work." (pp. 817 and 818 of opinion.)

Also the following extract is taken from the opinion:

"He was not employed as a timberman, but as a miner and machineman, or driller. It was no more a *part of his duty to inspect the timbering above him, or the condition of the rock in the chamber above,* according to the custom in that mine, than it would have been to inspect the track on the tunnel floor, or the cars in which the ore was carried out. *Other men were detailed for that part of the work.* The shift boss, whose orders he was obliged to obey, indicated the place in which he was to work; directed the number of holes to be drilled in the breast of the tunnel, and that the blasts should be fired at noon. He entered upon the performance of his duties, and was warranted in the assumption that the necessary precautions had been taken by the defendant to prevent the caving and falling of rock from the stope above." (p. 818 of opinion.)

Also the following on page 819:

"In the present case the evidence on the part of the plaintiff tended to show that the rock fell from a place which was entirely under the control of the master, and which the servant was not bound to inspect."

Also: "It was not his duty to timber the mine, *or to pay any attention to that work, unless it was obviously defective, in his understanding, in the immediate vicinity of his work. That duty belonged exclusively to the defendant.*"

It will thus be seen that the plaintiff in the Jones case had no duty to perform in *examining the roof of the tunnel,* where he was working or in *repairing same.* Consequently he did not assume any risks from the dangers of said place and the performance of such duty and the *neglect of such performance* could not be *his negligence.* How is that case applicable to the case at bar, where such *inspection and examination* was peculiarly the *plaintiff's duty* and in *the exercise of it he assumed all risks in performing such duty?* The two cases are not similar at all, in fact they have no bearing upon each other. Counsel recognizes the difficulty with the case and seek to obviate it by claiming that the tunnel at the point from where the rock fell was "*completed and turned over to the care and control of the defendant,*" so that

the plaintiff had no further duties to perform. This is a nice theory, but it does not fit the facts of this case. Counsel say that the testimony of Carlson, who worked on the shift preceding plaintiff, was that he procured Widitz, the plaintiff's foreman, to examine the place in question and he pronounced the place safe at least to the extent of not needing timbers. On that testimony, which is denied by Widitz, counsel for defendant in error rest their *entire case* so far *as assumption of risk is concerned,* because if they cannot establish the theory that that is a *"completed tunnel"* by reason of that testimony and that act of Widitz, they recognize that they fall squarely within the rule that we contend for. Let us see whether that places them in such a position. The location was from two and one-half to three and one-half or four feet from the breast of the tunnel at that time. The testimony universally shows that the discharge of the blasts *changed the condition of the tunnel with every shift and loosened the rock in the roof* and sides sometimes as far back as from fifteen to twenty-five feet. Assuming Carlson's testimony to be true, *it was the condition at that time that Widitz was pronouncing upon and that only.* Under the testimony that *condition* would *change* with the *next blast.* He said at that time it was safe. The facts proved that

it *did not fall during that shift.* Did the passing of his judgment *upon that condition, foreclose* the *defendant and charge it with the responsibility* of saying it would *always be safe no matter how many shifts, exploded their terrific blasts* within two or three feet of it? The testimony shows that it is the rock miner's duty when he finds a change upon first entering the tunnel, that if it is too dangerous in his judgment to work under, he should *report* it to the *foreman.* Is it reasonable to say that if Mr. Shields had found it dangerous on such examination as he started to make, that he could safely rest upon the fact that Mr. Widitz had pronounced it safe *the day before,* when by the shots *just fired* the entire rock had become *separated and was hanging down in an extremely dangerous position?* Nonsense! The *change of condition made a foundation for the change of opinion by the foreman.* The defendant was not bound by the opinion given by the foreman *of a condition prevailing yesterday* as applicable to an *entirely different condition today.* Furthermore if there is any efficacy in counsel's theory, it would be upon the ground that the plaintiff *knew that the defendant's foreman* had examined the situation and *pronounced it safe* and he therefore relied upon it and *made no further examination and was lured into*

security by such reliance. On no other ground could counsel expect his theory would justify the failure of *inspection and examination by plaintiff?* There are several defects in that reasoning. One is that there is nothing in the testimony to show that the *plaintiff ever knew of the foreman passing upon the condition the day before, and pronouncing it safe,* so that is a mere assumption by counsel. The chain is no stronger than its weakest link, but here is a *link* that is *entirely missing, so there is no chain at all.* Another trouble with counsel's theory is that the evidence shows that the plaintiff did not rely upon that or anything else, but proceeded to make his *examination* and intended to *rely solely upon that examination.* Another trouble with that theory is that this broken rock and defective roof was within two and one-half feet to four feet from the face of the tunnel, where the testimony shows that the condition would be changed and the rock broken sometimes as far back as fifteen or twenty-five feet. It cannot be said with any show of reason or good faith that at that point and at that stage of the construction of that tunnel, it *was "completed"* "and turned over to the defendant," so as to place it entirely in the control of defendant. The theory does not fit the facts of this case at all. Counsel's frequent assertions in a vain attempt to make

out that this was a *"completed tunnel"* at this point are only explained by the fact that a drowning man will catch at a straw. They realize that the case is hopeless on "assumption of risk," and try to maintain that theory so as to bring the case within the decision in the Jones case. But it must be apparent that both from the fact that the plaintiff in that case had *no duty to perform in examination of the tunnel* and that his work did not cause a constant change, it has no resemblance in fact or law to the case at bar.

Counsel also cite the case of *Highland Boy Gold Mining Co. vs. Pouch,* 124 Fed. Rep. 148, to help defendant out on the theory of the tunnel being "completed" and under the control of the defendant. The facts are sufficiently apparent from the syllabus which is as follows:

"Where plaintiff, a miner was injured by the falling of a wall in a mine in a completed chamber, alleged to have resulted from insufficient timbering, and it *did not appear* that at the time *plaintiff was doing any work which would render the place insecure,* and instructions that defendant was not bound to keep the stope where plaintiff was working continuously safe, on the theory that the master is not required to keep the place where his servant works continuously safe, where the doing of the work is of such a character as temporarily renders the place insecure, was properly refused as inapplicable. Where evidence tended to show that certain timbers in the stope in which plaintiff was injured were taking weight,

the defendant not only promised to erect additional supports but assured plaintiff that it was perfectly safe for him to remain there and continue his work, such evidence justified an instruction. that if the plaintiff called attention of the shift boss to the fact that some of the posts were taking weight and that the boss promised to remedy the defect and plaintiff continued to work because of such promise, he did not assume the risks from such defect."

On page 151 of the opinion is the following:

"In support of this contention counsel for the plaintiff in error invoke the doctrine, which has been announced by this and by other courts, that the rule of law requiring a master to exercise ordinary care in providing his servants with a reasonably safe place in which to work does not compel the master to keep the place where the servant works at all times safe where the work being done, is of such a character as necessarily renders the place temporarily or from time to time insecure."

Citing:

The Finlayson case, 67 Feb. 507;

Armour vs. Hahn, 111 U. S. 313;

Gulf, Colorado & Sante Fe Ry. Co. vs. Jackson, 65 Fed. 48;

(All of which are cited in principal brief of plaintiff in error, pp. 36 to 43.)

"We think, however, that the rule of law thus invoked has no application to the case in hand. Little 2 Stope, which caved in and caused the injury was in a certain sense a '*completed chamber*,' under ground,

through which men were expected to pass, and in which they were required to work. *Moreover, the plaintiff's injuries were not occasioned by any work which he was doing which made the place insecure.* As the stope was a completed chamber in which employees of the mining company were expected to work, it was the company's duty to exercise ordinary care in timbering it so that it would not collapse and that they might work therein with ordinary safety. The complaint made in the present instance is that this duty was not faithfully performed, and that if the proper supports for the hanging wall had been set it would not have caved in as it did. *It may be conceded that if the plaintiff below had been injured while drilling and blasting, by the fall of a rock in an unfinished part of the stope where he was at work, the principle of law invoked would be applicable;* but as he was not injured in this manner, but was injured by a general collapse of the entire stope, which might have been guarded against by sufficient timbering, the court was justified in giving the instruction which it did give of its own motion and in refusing those that were asked."

It will thus be seen in this case cited by counsel, the court recognizes the rule we contend for and distinguishes this case from one in which the rule is applicable. In this case the chamber in which the plaintiff was working was a completed chamber. He was doing no work that caused change of conditions. After the tunnel is completed and made a safe tunnel, and is far enough removed from the changing conditions caused by the work in the breast of the tunnel, *and its condition is thereby permanent, then*

the master is continuously responsible for its condition and not until. In each of the cases cited by counsel, the work was completed and permanent; hence they have no application to the facts in the case at bar.

Respectfully submitted,

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